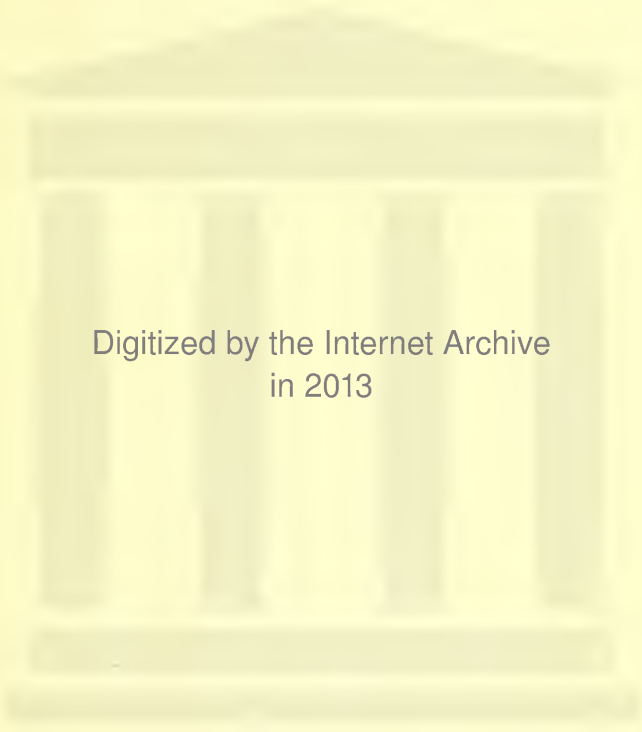

CASES

OF

HABEAS CORPUS,

DECIDED BY THE

SUPREME COURT

OF

NORTH CAROLINA,

AT THE JUNE TERM, 1863.

BY HAMILTON C. JONES, Esq.,
REPORTER.

SALISBURY, N. C.
J. J. BRUNER, PRINTER.
1863.

CASES AT LAW,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1863.

IN THE MATTER OF J. C. BRYAN.*

HABEAS CORPUS.

The Courts and Judges of the States have concurrent jurisdiction with the Courts and Judges of the Confederate States in the issuing of writs of *habeas corpus*, and in the enquiring into the causes of detention, even where such detention is by an officer or agent of the Confederate States.

The courts of this State, as well as the individual Judges, have jurisdiction to issue writs of *habeas corpus* and to have the return made to them in term time and, as a court, to consider and determine of the causes of detention.

A person liable to military service, as a conscript, under the Act of Congress of April, 1862, and who, by virtue of the 9th section of the act, regularly procured a discharge by furnishing a proper substitute, cannot again be enrolled as a conscript under the act of September, 1862.

---

*Judge MANLY was absent during the greater part of the term on account of sickness, and did not participate in the consideration of any of the cases of habeas corpus decided at this term.

In the matter of Bryan.

Bryan, the applicant, petitioned to the Supreme Court, at the present term, for a writ of HABEAS CORPUS, alleging that, being between the ages of eighteen and thirty-five years, he procured a substitute, who was duly received by *Peter Mallett*, then Major in command of the conscript camp, near Raleigh, and the chief enrolling officer of the State, and that the said Major Peter Mallett, on the 29th day of July, 1862, gave him a discharge for the war; that the age of the said substitute was thirty-nine years; that on the 16th day of June, 1863, he was arrested as a conscript, and was at the date of his petition in the custody of Lieut. J. D. H. Young, of Franklin county, as a conscript, under the second law for raising conscripts, (September, 1862,) and that the said Lieut. Young is about to carry him to Camp Holmes, a rendezvous for conscripts, near the city of Raleigh. The prayer of the petition is for a writ of *habeas corpus*, to enquire into the cause of detention of the said J. C. Bryan and for a discharge. The Court ordered the writ, which was accordingly issued by the clerk, and was returned with this endorsement: "I accept the service of this writ and return for answer: that the facts set forth in the petition are substantially true, and that I arrested him by an order of the enrolling officer for 5th congressional district.

J. D. H. YOUNG,
Lieut. 40th Reg't. N. C. Militia."

On the return of the writ a day was given in Court for the hearing of the case, and as a preliminary to the consideration of the facts stated in the petition, the Court requested arguments from gentlemen present, on the question, whether this Court and the other courts of superior jurisdiction and the Judges individually of this State, have jurisdiction to issue writs of *habeas corpus*, and to consider the causes of detention, where the imprisonment or detention was under the authority of the Confederate Government. Thereupon,

Mr. Moore, in support of the jurisdiction, argued as follows:

1. The jurisdiction of the States in cases of *habeas corpus*, is strongly maintained by the Federalist, No. 82. "Its opinion has always been considered of great authority. It is a com-

plete commentary on our constitution, and is appealed to by all parties in the questions to which the instrument has given birth. Its extrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, are entitled to the more consideration," &c., per Marshall, Ch. Jus.; in *Cohens* v. *Virginia*, 6 Wheat. 418.

2. The judicial annals of the country, for more than half a century past, affirm it with a unanimity rarely witnessed on any great legal and constitutional question.

The jurisdiction is settled in New York; *Ferguson's case*, 9 Johns, 239; *Stacey's case*, 10 ib. 328; *Carlton's case*, 7 Cow. 471; *United States* v. *Wyngall*, 5 Hill, 16; 1 Kent's Com. (8 ed.) 440. In New Hampshire, *State* v. *Dimmick*, 12 N. H. Rep. 197. In Massachusetts, *Commonwealth* v. *Harrison*, 11 Mass. Rep. 63; *Same* v. *Cushing*, *ib.* 67; *Same* v. *Downs*, 24 Pick. 227; *Sim's case*, 7 Cush. 285; *Lewis' case*, reported in 2 N. C. Law Repos. 747. In Pennsylvania; *Commonwealth* v. *Holloway*, 4 Bin. 512; *Lockington's case*, 9 Brightly, 269; *Commonwealth* v. *Fox*, 7 Barr, 336. In New Jersey; *State* v. *Brearly*, 2 South. 555. In Maryland; *Ex Parte Almeida*. In Virginia; *Ex Parte Pool*, and *Pleasants' case*, Hurd on Hab. Corp. 190—1. In North Carolina; *Ex Parte Mason*, 1 Mur. 336, and note to *Shorner's case*, reported in 1 Car. Law Repos. at 58; Lewis' case, ante, was doubtless selected and reported in this State by the learned Chief Justice Taylor, as containing the judicial opinion of North Carolina on this subject. It has been uniformly so regarded by the profession. In South Carolina; 5 Halls' Law Journal, 497; 1 Kent's Com. 440, n. c. In Georgia; Hurd on Hab. Corp. 168–9.

In some of the cases, counsel for the United States appeared in the State courts without opposing their jurisdiction.

The opinions of State Judges disclaiming jurisdiction are few. Chief Justice Kent's in Ferguson's case, the ablest to be found, delivered in 1812, was forever surrendered by him in 1813, without a struggle, in Stacy's case; and in 1828, he said in his Commentaries, "the question was settled." The error of his reasoning is based upon the idea, that the proper test whether a State court has jurisdiction of any case of habeas corpus is, whether it may take jurisdiction of *every* matter connected therewith, however remotely.

This is not the test. The case of imprisonment is a complete and independent case of itself. The Supreme Court of this State may hear and determine the case of a person arrested for homicide, yet it has no jurisdiction over the homicide.

The of opinions of Judge ——— in South Carolina in 1819, cited in Hurd, 189, and that of Judge Nelson of New York, a Federal Judge, assert that a State court has no power to pronounce an act of Congress unconstitutional—*this is the basis of their opinion.*

Judge McLean's opinion, Hurd, 200, presents a case of a *quasi* adjudication, which placed the prisoner beyond the jurisdiction of the State tribunals.

The doctrine of the State tribunals, in regard to the exercise of their jurisdiction in cases of restraint of the person under color of Confederate authority, is this: *The writ cannot be used by them to defeat the exercise of a jurisdiction already begun by a Confederate Court or a judicial officer and still pending: or to exercise a corrective jurisdiction over any Confederate Court or judicial officer.*

It is the same as it is, generally, in the State tribunals among themselves, where a Judge or a State Court is called on to hear the case of one imprisoned or arrested under color of another State judicial authority—the same as in England, 1 Chit. Cr. L. 104–5. The true line is laid down in *Ex parte Pool*, ante, and well illustrated by the cases cited in Hurd 335, et seq. The rule is well established, and there is little

danger of a conflict; not so much, by far, as there is between the opinions of the District Confederate Judges of the several States, while there is no Supreme Court to settle the law.

The case of *Ableman* v. *Booth*, 21 How. 506, is correctly decided. The facts, which are particularly stated by Chief Justice Taney, present the two propositions so clearly announced by him on p. 514 and 515. Both of these propositions are disposed of by the Chief Justice in precise accordance with the rule before stated. They find no support in the practice of a single State, which before that time had undertaken to exercise concurrent jurisdiction. They are announced by the Chief Justice p. 514, to be "new in the jurisprudence of the United States, as well as of the States."

It cannot be supposed that the Court, without any necessity for it, intended, without ceremony, to throw down and tread with silent contempt on the decisions of the able Judges of ten States, made and repeated through a period of fifty years.

If the opinion is properly interpreted in the construction contended for by the Secretary at War, it is a mighty onslaught on those reserved judicial rights of the States so ably maintained and defended by that very eminent jurist and statesman, the author of No. 82 of the Federalist; and strikes a no less blow on the eminent Chief Justice Marshall, who has bestowed on it his immortal praise.

Every recent alteration of the Federal constitution by the Confederate States, is made with a purpose to contract the powers of the general government and enlarge those of the States; and many alterations of the laws are significant of the same purpose. The extensions of the writ of *habeas corpus* by the acts of Congress of March 2, 1833, and Aug. 29, 1842, the former made in the nullification times to reach the cases of such as might be confined by State tribunals while obeying the laws of Congress, and the latter, to meet such cases as McLeod's, which occurred in New York, are wholly omitted in the judiciary act of March 16, 1861. It is conceded that a State court may issue the writ for *every* prisoner; but it is contended that if upon the return, it appear the prisoner is

confined under color of an alleged act of Congress, he must be remanded. How is the act to be made appear? It is answered, all public acts are judicially known. Suppose the Court is satisfied that there is no such act? It is answered that, of course, the prisoner must be discharged. Suppose the Court are satisfied that the act, though not by express words, yet by clear implication, is repealed? The same judicial knowledge of the nullity of the act exists, and here, again, the prisoner must be discharged. But suppose, in the opinion of the Judge, the act is manifestly unconstitutional, can there be any difference in the judicial mind between a *repealed* act and an *unconstitutional* act? Suppose an act passed to authorise the Secretary at War, "without warrant or probable cause supported by affidavit," to have arrested all civilians whom he might suspect of *disloyalty*, and a prisoner thus arrested should be brought up by *habeas corpus* before a State tribunal, it is conceded, that if the Court cannot look at the act, he must be discharged under the constitution: And it is further conceded, that the act is unconstitutional and void in law, yet, it is contended that the Court cannot see the constitution, and can only see the act; and for the time the functions of the Court, sworn to support the constitution and only such laws as are "made pursuant thereto," are to be utterly suspended, attended by the consequent absurdity, that in the most trifling of all causes, the Court must regard, and in the greatest of all causes, it must disregard the supreme law of the land. In the former the *true* law, and in the latter, the *false* law is to be administered.

A doctrine which allows a court to perceive, judicially, that one valid act of legislation is annulled by another and subsequent one, and yet forbids the same court to judicially see that an act of temporary legislation is annulled by an anterior, unrepealable and inconsistent law, does not belong to the science of law.

The State courts have not adopted the construction insisted on, but still maintain a concurrent jurisdiction in this and similar cases. In *Isaacs* v. *Claiborne*, decided in March last,

by Judge Lyons, of Virginia, he enjoined the defendant from impressing private property for the government under orders from the Secretary at War, and was not deterred from exercising jurisdiction, by objections tending to place the case beyond the State courts. The powers claimed by the officers, he tested by the Confederate Constitution, the law of eminent domain in the government, and the emergency of the occasion; and of all of them he judged himself. Certainly the Confederate Judge would have had jurisdiction of this case also, the wrong being done by high officers of that government, under color of Confederate authority.

No time could be less fortunate than now to overthrow the guards of personal liberty. No time less auspicious, for the honest fame of a high judicial tribunal, to listen to the seductions or menaces of power.

A denial of jurisdiction to the States, is little short of an abrogation of the "great palladium of personal liberty."

In all the past exertions to concentrate power, none have been so dangerous to liberty, and all of them together could not so humble the dignity and sovereignty of the States.

Mr. Strong, District Attorney of the Confederate States, with whom was *Mr. Bragg*, *contra*, argued as follows:

The true question is, has a State Court the right, by Writ of *Habeas Corpus*, or otherwise, to interfere with and *thwart* officers of the Confederate States, acting in the exercise of authority under a *law* of that government? The right is denied as incompatible with the general powers granted by the constitution to that government, which government would become inefficient in its action, and soon fall into contempt, were the right generally exercised.

In *Ferguson's case*, 9th John's. Rep. page 239, this view is ably sustained by Judge Kent. He says, "the present case being one of enlistment *under color of authority of the United States*, and by an officer of that government, the Federal courts have *complete* and *perfect* jurisdiction in the case; and there is *no need of the jurisdiction or interference of the State courts;* nor does it appear to me to be fit that the State courts

should be enquiring into the abuse of the authority of the general government. Nevertheless, cases may be supposed of the abuse of power by the officers of the government of the United States, but the courts of the United States have competent authority to correct all such abuses, and they are bound to exercise it. * * * We have no reason to doubt of their readiness, as well as ability to correct and punish every abuse of power under that government. * * * My conclusion is that for the Court to interpose in this case would be to exercise power without any jurisdiction." Judge Kent never changed this opinion. In *Stacy's* case, 10th John's. 328, he *yields* to his associates, and in his commentaries announces a fact simply, when he says, "the question is settled."

Mr. Moore contended that this reasoning failed in its application to the Confederate government, and argued that the judiciary act of the United States gave to the Federal Judges jurisdiction by *habeas corpus* in cases of confinement, under *color of authority* of the U. States, as well as by *by virtue of that authority;* whereas, the Confederate Judges have jurisdiction only in cases of restraint, *by virtue* of the Confederate authority, Judiciary Act of the Confederate States, sec. 16: that "color of authority" was a cloak for *no* authority, and "virtue of authority" was valid, legal authority; that, therefore, the State Courts must have jurisdiction in the former case, or the citizen be without remedy, as the Confederate Courts have jurisdiction only in the latter case, that is, only in the case where the applicant *can derive no possible benefit from the writ, and must be remanded of course.* Egregious fallacy!

Judge Cheves of South Carolina, in a learned opinion published in the 12th vol. of Niles' Regiter, declined to take jurisdiction over the matter of the discharge of one imprisoned under process issued by authority of the United States, and the Recorder at Charleston has refused to interfere with the detention in the army of an infant only sixteen years old, maintaining that the decision of Judge Cheves has since been acquiesced in as a correct exposition of the law in

South Carolina. *Ex parte Rhodes* 12, Niles' Register 264. In *Re Benj. Sauls*, Charleston Courier, Oct. 20, 1862.

The opinion of Judge Kent has been uniformly sustained by the Judges of the Federal courts. *In re Veremaitre*, *Am. Law Journal*, 438, the Court said: "a State Court has no jurisdiction on *habeas corpus* to discharge a soldier or sailor held under law of the United States." The case of *Norris* v. *Newton*, 5 McLean, 99, is to the same effect as is also Judge Nelson's charge to the grand jury of the circuit court for the Southern District of New York, quoted in Hurd on *Habeas Corpus*, pp. 198 and 9. In the case of *Ableman* v. *Booth*, 21st Howard's Rep. 506, Ch. Jus. Taney in delivering the unanimous opinion of the Court, said: "The powers of the General Government, and of the State, although both exist, and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.—And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or State court, as if the line of division were traced by land-marks and monuments visible to the naked eye. And the State of Wisconsin has no more power to authorize these proceedings of its judges and Courts than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned." "We do not question the authority of the State court or judge to issue the writ of *habeas corpus*, provided it does not appear, when the application is made, that the person imprisoned, is in custody under the authority of the United States. And, it is the duty of the person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him. But, after the return is made, they can proceed no further. The prisoner is then within the dominion and exclusive jurisdiction of another government. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrong-

fully imprisoned, their judicial tribunals can release him, and afford him redress. No State judge or court, after it is judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before it. And if the authority of a State should attempt to control the principal or other authorized *officer* or agent of the United States, in the custody of his prisoner, it would be his duty to resist it. No judicial process can have any lawful authority outside of the limits of the jurisdiction of the judge or court by whom it is issued; and an attempt to enforce it beyond these boundaries, is nothing less than lawless violence."

It is contended, that inasmuch as Booth was confined under the *order of a court*, the case is no authority, for the position assumed, and that the above quoted language is a mere *dictum*. But, if it be true, that it is the duty of the State to *protect* its citizens against wrong from *an outside hostile government*, which is the very basis upon which the argument proceeded, what peculiar sanctity is there in a *judicial* wrong, that *it* should not be relieved against? A citizen of North Carolina is *grievously* wronged by what is known to be the *corrupt* decision of a servile Confederate court; he comes to his protecting sovereign for relief; would he not feel it a mockery to be told that as the wrong was perpetrated by a court, he must submit! The true principle in the case is, that a clash of Confederate and State authority should be avoided, if of the authority of the judicial power; how much more, of the executive and legislative, which wield the purse and sword!

I am fortified in taking this view by that very distinguished jurist, Judge Campbell, now Assistant Secretary of War, and by the able opinion of Chief Justice Walker, in the case *Hill*, recently decided by the Supreme Court of Alabama. To that opinion the attention of the Court is specially invited. The facts were, a party claiming exemption from military service by reason of physical infirmity, applied to the Probate Court for a writ of *habeas corpus*, which was granted. Hill,

the officer, who obtained the petition, applied to the Supreme Court for a writ of prohibition, on the ground that the Probate Court had no jurisdiction, which was granted. The Chief Justice, by a careful review of the Acts of Conscription, and the regulations founded on them, established the proposition, that it was the duty of the enrolling officer, upon hearing evidence, and considering the law, *to decide* in a *quasi* judicial manner, *upon the status of every citizen as to his liability to military service*, and to act upon that decision; and after an elaborate review of the authorities, concluded that "the case was without the jurisdiction of the Probate Judge," and that the general rule that the State Courts have concurrent jurisdiction with the Confederate Courts is "subject to the exception of those cases in which the execution of the laws of the Confederate States by its officers, is to be supervised and controlled." In support of this conclusion, the case of *Slocumb* v. *Mayberry*, 2 Wheat 1; cited by the opposing counsel, is a direct authority. An act of Congress made it the duty of collectors of ports to seize and detain *vessels* when suspected of an intention to violate the embargo act of April, 1808, 2nd Statutes at large, 499. In other words, the collector was "*to decide in a quasi judicial manner upon the status of every vessel, as to its liability to*" seizure and detention under the law, and to act upon that decision. The Supreme Court of the United States decided that an action of replevin would lie for the *cargo*, because there was no law authorizing the seizures of cargoes, *but that it would not lie for the vessel.* All admit that this is a case in point, because, as by the action of replevin, the property is taken from the hands of the officer, so by the writ of *habeas corpus* is the body of the prisoner. But there is a wide difference in its application.

The counsel cited the case of *Isaacs* v. *Claiborne*, "decided in March last by Judge Lyons of Virginia, who enjoined the defendant from impressing private property for the government, under orders from the Secretary of War." The case is not in point. This case would be, if under the recent act of Con-

gress, regulating impressments, the proper officer having *decided* that certain stores were necessary for the army, and, in accordance with that decision, having seized them, a State Court should undertake to *take them from him, by a writ of replevin, or otherwise.* Who will insist upon *such* a jurisdiction? If the officer should act corruptly or oppressively, he would be liable in the State courts in damages to the party grieved; but his action could not be controlled—he could not be deprived of the stores. Otherwise, the army might be left to starve.

It is believed, that if this power be conceded to the States, it will be impossible for Congress to suspend the privilege of the writ of *habeas corpus;* and, to the legal eye, its suspension is as necessary under some circumstances, as its exercise is under others.

Article 1, sec. 9, clause 3, of the constitution declares—"the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion, the public safety may require it." What writ? The State writ? It surely can not be contended that Congress has the power to suspend the writ which the father uses for the recovery of his child, the master of his apprentice, the husband of his wife, or the party improperly refused bail under State process, of his liberty. What writ then is it? It is that, *and that only* which pertains to the courts of that government which that constitution has established. On this point, the authorities are full. Hurd, p. 133, says, "it is a settled rule of construction of that instrument, that the limitations of power contained in it, when they are expressed in general terms, apply only to the government created by it. And although this clause has not been the subject of express adjudication, there is no doubt that its construction is governed by this rule, and, *consequently, the restriction does not extend to the States.*" For this he cites, among many other cases, *Barron* v. *The Mayor and City of Baltimore*, 7 Peters 243, in which the subject is fully discussed, and the above conclusion arrived at by Chief Justice Marshall, in delivering the opinion of the Court.—

Now, if the courts of the States can issue writs of *habeas corpus*, in all cases where parties are detained under Confederate authority, and if Congress cannot suspend those writs, is not the right of Congress, which is recognised in the above clause of the constitution, *nullified?* Why suspend the privilege of the writ as exercised through a Confederate Judge, when, in the very same case, it may be exercised through all State Judges, which, in this State, number eleven?

The converse of the proposition laid down in the beginning is generally true, and the boundary lines between the jurisdiction of the State and General Governments, has been well observed upon the part of the latter; see Kent, vol. 1, p. 411; Hurd 154; Judiciary Act Confederate States, sec. 16; *Carryl* v. *Taylor*, 20th Howard.

There can be no necessity for the exercise of this power on the part of the States. The Confederate government is a *free* government, with the disposition and the power to protect *its citizens* against all oppression coming from its own officers.—It was framed, as its preamble declares, "to secure the blessings of liberty to ourselves and our posterity." It is the development and personification of the most exalted *idea* of freedom. So far from its being the duty of the States to guard against oppression from the Confederate government, it is the duty of the Confederate government to guard against oppression on the part of the States. Article 4, sec. 3, clause 4 of the constitution declares that "the Confederate States shall guaranty to every State that now is, or hereafter may, become a member of this Confederacy, a republican form of government." The courts of this free government are open to every one. To them let him who is oppressed under color of its authority apply, doubting nothing, but that he will find relief. Let not the absurdity be adopted, that it is the duty of the State to protect the freedom of the citizen from invasion by a government, which is not only itself free, but the design of whose creation, was to preserve freedom.

There is a most *palpable* fallacy underlying that portion of the argument of *Mr. Moore*, which contends that the doctrine

contended for by the government would lead to the absurdity "that in the most trifling of all causes the Court must regard, and in the greatest of all causes, it must disregard the supreme law of the land. In the former, the *true* law, and in the latter the *false* law, is to be administered." The fallacy lies in supposing that the false law is to be administered or passed upon at all by the State court. *It is not so to be administered.* And although were it to be administered, there would certainly be "no difference to the judicial mind, between a *repealed* act and an *unconstitutional* act," yet, it may very well be that in the one case the court may have jurisdiction of the question, and, in the other, not. It might require less ability to decide upon the repeal than upon the constitutionality of an act. The court *sees* both questions in order to decide upon its jurisdiction—a power which all courts must exercise *ex necessitate.* So it is well argued that the illogical conclusion which the *counsel* arrived at, by his own false reasoning, "does *not* belong to the science of law."

It is no valid argument in favor of the right of the State courts, that Congress, having failed to establish a Supreme Court, there could be no uniform rule of decision among the District Judges. The failure by Congress to exercise a power, which it ought to have exercised, can give no right to this Court to exercise a power which it does not possess. It is true, in matters of constitutional law, as of ordinary morals, "that two wrongs cannot make a right." Besides, we are acting for posterity, and it is better to suffer a temporary inconvenience, however great, than to break down the bulwarks of the Constitution.

The old Union was destroyed, not by the encroachments of the General Government upon the rights of the State, but by the encroachments of the fanatical States of the north and northwest upon the Constitution, especially that portion which guaranteed to the Southern States certain rights, greatly valued by them. These encroachments took the shape of "personal liberty bills," and interference of the courts *by writs of habeas corpus* with the proper jurisdiction of the General

Government. Let us avoid the bad example. Let us also remember in the forcible language of Judge Stone, in his opinion in the matter of Hill, *ubi supra*, that "the States have become constitutional, instead of absolute sovereignties, and that this no more destroys State sovereignty, than does the surrender of certain attributes of natural liberty, destroy civil liberty."

The following point was not made in the discussion, it not having at the time, suggested itself. The exercise of the jurisdiction contended for, would, in many cases, be impracticable. Suppose the Confederate officer should refuse to obey the writ, or having obeyed it, and the prisoner having been discharged, he should again arrest him, and the officer should be attached for the contempt in the one case, or should be arrested under a States-warrant in pursuance of our statute in the other, and in either case, the Confederate government should avow the acts of its officer, and assume their responsibility, the proceeding against the officer would at once come to an end, according to the principle in *McLeod's* case, and in the case of *Bruen* v. *Denman*, 2d Exchequer Rep. 176.

Mr. P. H. Winston, Sen'r., in support of the jurisdiction, argued as follows:

By 2nd section of 3rd article of the Constitution of the United States, it is provided that the "judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made under their authority." The 25th section of the Judiciary Act of the United States, provides for appeals and writs of error from State courts in cases falling within this grant of power; thus recognising the rule that an affirmative grant of jurisdiction does not give exclusive jurisdiction. The case of *Houston* v. *Moore*, 5 Wheat. 1, is a decision that an act of Congress giving jurisdiction simply to courts of United States of a class of offences, does not exclude State courts from exercising jurisdiction under State laws over the same class of offences. And this doctrine is explained and illustrated by

Judge Washington in that case, and by Judge Story in *Martin* v. *Hunter's* lessee, 1 Wheat. 336–7 and 340. This rule is recognized and enforced by the Judiciary Act of the Confederate States. Our Constitution declares that "in all cases affecting ambassadors, or other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction; yet, that act gives exclusive jurisdiction to that Court in cases *against* ambassadors, &c., and in others affecting them, jurisdiction concurrent with other courts. So, of cases in which a State shall be a party.

The courts of this State have exercised the power of relieving persons unlawfully detained by officers of the United States under color of authority derived from them; *Ex parte Mason*, 1 Mur. 336, and it is believed that the profession have never doubted the propriety of its exercise. *Slocumb* v. *Mayberry*, 2 Wheat. 1, is decesive of the question. If goods will be taken from a federal officer's custody by process from a State Court, because he detained them wrongfully, though by color of an act of Congress, *a fortiori*, will a *habeas corpus* lie to deliver a man from false imprisonment.

The exclusive jurisdiction of the Confederate Courts in criminal cases, is not invaded; for enquiry into the lawfulness of imprisonment by *habeas corpus*, is not an exercise of criminal jurisdiction; *Ex parte Bollman* and *Swartwout*, 4 Cranch, 100. Accordingly, the Supreme Court of the United States refused writs of *habeas corpus* in *ex parte Kearney*, 7 Wheat. 38, and *Ex parte Watkins*, 3 Peters, 193, because the object of the petitioners was to review the judgments in criminal cases; and, though the court of common pleas grants the writ, it posseses no cognizance of criminal cases; *Bushel's case*, Vaughan; *Wood's case*, 3 Wilson, 1172.

The claim to exclusive jurisdiction for the Confederate Courts, is more emphatically groundless, because their judicial power in respect of the chief purposes for which it was given, is in abeyance. These purposes are to secure the uniform administration of the laws, correspondent to their uniform enactment; to avoid affording causes of quarrel to foreign na-

tions, by making effectual provision for the impartial and enlightened administration of national law, and to protect the persons and property of our own citizens against violations of the constitution of a State or the Confederate States. It is manifest that all these purposes are frustrated by the neglect of Congress to appoint Judges of the Supreme Court; although that Court exists, it having been established by the Constitution, it cannot perform its functions any more than if it were not in existence. The appellate jurisdiction is an essential part of the judicial power, and the latter is practically non-existent as long as there are no means provided for exercising the latter. Congress has shown its sense of this truth, by providing for writs of error and appeals from the District Courts to the Supreme Court.

The case lately decided by the Supreme Court of Alabama, does not affect the question here. The decision is probably right. The Judges differ in their reasons. Judge Stone seems to admit the jurisdiction of State courts in such cases as this. Chief Justice Walker's reasons for his opinion, are clearly insufficient. The passage he cites from Kent's Commentaries, at page 400, of the 1st Vol., says, that it is settled that State courts have a concurrent jurisdiction with the Federal Courts in granting writs of *habeas corpus*.

The decisions of enrolling officers, commandants of conscript camps, &c., on the liability to military service, cannot be judicial acts; they can be done only by Judges, and the Constitution declares that the Judges both of the Supreme and inferior Courts shall hold their offices during good behaviour; Article 3, section 1. Besides, if that were so, every man is liable to be imprisoned perpetually or indefinitely by the sentence of a military officer, without any right to have the cause of imprisonment enquired into by any court whatever; for the Supreme Court has no Judges, and the District Courts have no appellate jurisdiction.

Neither do the cases of *Ableman* v. *Booth*, and *United States* v. *Booth*, 20 Howard, 506, have any bearing upon this case. They constitute but one case: for the reversal of the

order of the State court, with respect to the last named case, disposed of the whole subject. There is no likeness between a State court attempting to use the writ of *habeas corpus* as an instrument for annulling a judgment of the Circuit Court of the United States, in a matter of crime against the United States and the case before this Court—the use of the writ for the purpose of delivering from unlawful imprisonment a citizen detained by a Confederate State's officer by color, but not by virtue of authority of an act of Congress.

——— v. *Booth*, has no likeness to this case. The petitioner was in custody of the Marshall by *virtue*, not by *color* of judicial process. Neither do any of Chief Justice Taney's remarks, in giving judgment, bear on this case. They are to the same effect as those of Chief Justice Marshall in *Slocumb* v. *Mayberry*, to wit: the State courts have no authority to take either a man or goods out of the custody of an officer of the United States detaining him or them under the authority given by the laws of the United States, and not merely by *color* of such authority.

Pearson, C. J. Governor Vance having informed the Judges that the Secretary of War puts his objection to the release of citizens who have been arrested as conscripts by the officers of the Confederate States after they had been discharged by the State tribunals on writs of *habeas corpus*, upon the ground that the courts of the State had no jurisdiction over the subject; the Court directed the question to be argued as preliminary to the disposition of the many applications before it by writs of *habeas corpus*, and assigned a day. As the organ of the Court, I addressed a communication to His Excellency the President of the Confederate States, informing him of the fact, and that the Court would be pleased to hear an argument by the Attorney General of the Confederate States or any other gentleman of the bar he might appoint for the purpose. The question has been fully argued by Mr. Moore and Mr. Winston in support of the jurisdiction, and by

Mr. Strong, District Attorney of the Confederate States, with whom was associated Mr. Bragg, against the jurisdiction.

We have devoted to the subject that temperate and mature deliberation which its great importance called for, and the Court is of opinion that it has jurisdiction and is bound to exercise it, and to discharge the citizen whenever it appears that he is unlawfully restrained of his liberty by an officer of the Confederate States. If the restraint is lawful, the Court dismisses the application and remands the party. If, on the other hand, the restraint is unlawful, the Court discharges him. The lawfulness or unlawfulness of the restraint necessarily involves the construction of the act of Congress under which the officer justifies the arrest, and the naked question is, by whom is the act of Congress to be construed? by the Secretary of War and the subordinate officers he appoints in order to carry the conscription acts into effect, or by the Judiciary? or if the latter, have the State courts jurisdiction over the subject? This, as was well remarked by Mr. Strong, is a dry question of Constitutional Law, and its decision should not be influenced by collateral disturbing causes.

The jurisdiction of the State courts over the subject, is settled in this State, and has been so considered as far back as the traditions of the Bar carry us. In 1815, Judge Taylor reported in the 2d North Carolina Law Repository, 57, Lewis' case, decided by the Supreme Court of Massachusetts, in which the Court, upon a *habeas corpus* to an officer of the United States, took jurisdiction and discharged a soldier on the ground that the enlistment was not valid by the proper construction of the act of Congress. That decision was concurred in by the bench and bar in this State, and the jurisdiction has ever since been exercised by our courts and Judges, and treated as "settled" until the present term of the Court. In Mason's case, the jurisdiction was exercised, and a soldier of the United States was discharged by the Court; 1st Murphy 336—(1809.) See also North Carolina Law Repository, note. We have traditions of other cases tried by single Judges, but no reports were made of them.—

About 1847, while on the Superior Court Bench, I exercised the jurisdiction, and a soldier was brought before me at Smithville, on a writ directed to the officer in command at Fort Caswell—Capt. Childs, who afterwards so highly distinguisl-ed himself in Mexico. In the matter of Mills, who claimed exemption as a shoemaker during the past winter, in my letter to Judge Battle and Judge Manly, asking their opinion as to the construction of the conscription and exemption acts, all three of us took it for granted that the question of jurisdiction was settled, and in the opinion filed by me in that and all of the other cases which have been before me, I set forth that the power of the State Judges to put a construction upon the acts of Congress, so far as they involve the rights of the citizen, (as distinguished from mere military regulations,) is settled, and all of the other Judges in this State, who have issued writs of *habeas corpus*, have so treated it—(Judges Battle, French, Heath and Shipp.)

The question has been considered as settled in the other States, and their courts have, in many cases, assumed and exercised the jurisdiction, and it has been conceded by the Courts of the United States. Chancellor Kent, 1st vol. 440, referring to Stacy's case, says: "The question was therefore settled in favor af a concurrent jurisdiction in that case, and there has been a similar decision and practice by the Courts of other States." In the note, many cases are referred to.—Hurd, in his treatise on *Habeas Corpus*, under title "concurrent jurisdiction," refers to and collates a great many cases which fully support his conclusion: "It may be considered settled that State Courts may grant the writ in all cases of illegal confinement under the authority of the United States." So, if any question can be settled by authority, the concurrent jurisdiction of the State Courts, must be treated as settled. It must be presumed that this long series of cases which establish the concurrent jurisdiction of the State Courts, and their power to put a construction on acts of Congress, when necessary to the decision of a case before them, is supported by the most clear and satisfactory reasoning, and it would be

idle to attempt to add any thing to what has been said by the many able Judges who have discussed the question. I will content myself by making a few extracts from some of the opinions. Tilghman, Chief Justice, in *Lockington's* case, Brightly's Reports 269, (in 1818,) says: "It is to be observed that the authority of the State Judges in cases of *habeas corpus*, emanates from the several States, and not from the United States. In order to destroy their jurisdiction, therefore, it is necessary to show, not that the United States have given them jurisdiction, but that Congress possesses, and have exercised the power of taking away that jurisdiction which the States have vested in their own Judges." Southard, J., in *State* v. *Brearly*, 2 South. 555, (1819,) says: "It will require in me a great struggle, both of feeling and judgment, before I shall be prepared to deny the jurisdiction of the State, and say that she has surrendered her independence on questions like this, and that her highest judicial tribunal, for such purposes, is incapable of inquiring into the imprisonment of her citizens, no matter how gross or illegal it may be, provided it be by the agents of the United States, and under color of their laws." "Have we lost the jurisdiction because we cannot construe and determine the extent and operation of acts of Congress? We are often compelled to construe them; they are our supreme law, when made in conformity with the constitution. Is it because the United States is a party? How does she become a party on such a question? Is she a party for the purpose of despotism, whenever a man who holds a commission from her, shall, without legal authority, or in violation of her own statutes injure, imprison or oppress the citizen? surely not." In *Slocumb* v. *Mayberry*, 2d Wheat. p. 1, (1817,) Slocumb was surveyor for the port of Newport in Rhode Island, and under the directions of the collector had seized the "Venus," lying in that port with a cargo, ostensibly bound to some other port in the United States. Mayberry, who was the owner of the cargo, brought an action of replevin in the State court for the restoration of the cargo. Slocumb put his defence on the ground that he was an officer of the

United States, and the seizure of the vessel and cargo was authorized by an act of Congress, and denied the jurisdiction of the State court. The court took jurisdiction, and decided in favor of Mayberry, on the ground that the act of Congress, by its proper construction, only authorized the seizure and detention of the *vessel*, and did not embrace the cargo; consequently the officer had detained the cargo against law. Slocumb carried the case to the Supreme Court of the United States, where it was held that the State court had jurisdiction, and had put a proper construction on the act of Congress. Marshall, C. J., says; "Had this action been brought for the vsssel, instead of the cargo, the case would have been essentially different, the detention would have been by virtue of an act of Congress, and the jurisdiction of a State court could not have been sustained; but the action being brought for the cargo, *to detain which the law gave no authority*, it was triable in the State court." I cite this case, particularly, because in the action of replevin, the thing is taken out of the possession of the officer, as the person is taken out of the possession of the officer under a writ of *habeas corpus*; so, it is directly in point to show that a State court has jurisdiction wherever the law gives no authority to detain the person or the thing; and, in order to decide that question, the State court has power to put a construction on the act of Congress under which the officer justifies the imprisonment or detention.

To oppose this array of authorities and reason, *Mr. Strong* relies on two cases: *Ableman* v. *Booth*, 21 How. 506, and "*Hill's* case," recently decided by the Supreme Court of the State of Alabama. With the decision in *Ableman* v. *Booth*, 21 Howard 506, we entirely concur, and agree with Taney, C. J., that it is "a new and *unprecedented attempt, made for the first time*, by a State court," to assume, not merely an exclusive jurisdiction, but a jurisdiction controlling the District Court of the United States. This decision of the Supreme Court of the United States, in no wise impugns the concurrent jurisdiction of the State courts, which has been settled by the authorities

and reasoning to which we have referred. Two cases were presented. Booth was arrested under a warrant of the Commissioner appointed in pursuance to an act of Congress in respect to fugitive slaves, under a charge of having aided in the rescue of a fugitive slave; and upon examination before the commissioner, probable cause being shown, he was committed to answer a charge of the United States for a misdemeanor, before the District Court, in the State of Wisconsin; he gave bail for his appearance, but was afterwards surrendered by his bail, and imprisoned by the marshal; whereupon he obtained a writ of *habeas corpus* from a judge of the State and was discharged. After being discharged, the grand jury found a bill of indictment against him in the District Court, upon which he was tried and convicted and sentenced to pay a fine and be imprisoned. While in prison, under sentence, he obtained a writ of *habeas corpus* from the Supreme Court of the State, and was discharged; whereupon the Supreme Court of the United States had the matter brought before it on a writ of error, and decided that as Booth, in the first case, was legally in custody of the marshal on a warrant of commitment to answer a charge for an indictable offence before the District Court, and in the second case, was in jail under the sentence of the District Court, the State court had no jurisdiction by *habeas corpus*, to take him out of the custody of the marshal, or out of jail and discharge him. This was the *decision* in the case, and if the language used by the Chief Justice, in delivering the opinion, is construed in reference to the facts of the case before the court, there is nothing either in the decision or the opinion, which denies the concurrent jurisdiction of the State courts. It is true the language is susceptible of a wider meaning, and may afford room for an inference that the learned Chief Justice "goes outside of the record," and expresses an opinion against the jurisdiction of the State courts in all cases where one is restrained of his liberty by an officer or *agent* of the government of the United States, although the imprisonment be unlawful, and is not authorized by the act of Con-

gress under which the officer professes to act; but, in our opinion, such an inference will do great injustice to that able jurist; he surely could not have intended to put "his *obiter dictum*" in opposition to the series of authorities above referred to, without making any allusion or reference to them, or any attempt to controvert the reasoning upon which they rest.—However this may be, the decision does not conflict with the concurrent jurisdiction of the State Courts, and the *obiter dictum*, if it be one, is not entitled to the weight of an authority, and must be treated simply as the opinion of an able lawyer on a question not presented by the facts before the Court, and entitled only to that degree of consideration which its intrinsic merit will command.

The same remarks are applicable to the case of *Hill and others*, recently decided by the Supreme Court of Alabama. The petitioners claimed to be entitled to exemption by reason of bodily incapacity, but had not been held unfit for military service in the field by a surgeon, under the rule prescribed by the Secretary of War. We fully concur in the decision of the case before the Court; indeed, during the last Spring, I refused the application of two persons who claimed exemptions on the ground of being "unfit for military service in the field by reason of bodily incapacity," because by the proper construction of the exemption act, only those persons are exempted, who shall be held "unfit for military service in the field, by reason of bodily incapacity under rules to be prescribed by the Secretary of War;" and, according to these rules, it was necessary that the party should be examined by a surgeon, or board of surgeons appointed for that purpose, and the certificate of the surgeon or board of surgeons, was the only evidence of bodily incapacity that could be acted on as evidence of the fact; so, in that case, the parties were not unlawfully restrained of their liberty, but were lawfully in custody of the officer of the Confederate States, under the authority of the acts of Congress, according to their proper construction. Consequently, that decision is not opposed to the jurisdiction of the State courts, when by the proper construc-

tion of the acts of Congress, one who is not liable to conscription, or who is exempt, is restrained of his liberty against law. That portion of the opinion, and reasoning of the learned Chief Justice, which is not applicable to the case, made by the facts before the Court, has received from us due consideration.

On the argument, this position was taken: Congress may authorize the President to suspend the writ of *habeas corpus:* this would not apply to the State tribunals, and if the State courts and Judges have power to issue the writ when a person is imprisoned by an officer of the Confederate State, the suspension of the writ, so far as the tribunals of the Confederate States are concerned, would be vain and nugatory. This reply answers the position: The act of Congress would specify the cases in which the writ might be suspended, or would, in general terms, authorize the President to suspend it in all cases where a person shall be imprisoned by order of the President. And, as the acts of Congress made in pursuance of the constitution, are the supreme law of the land, it follows that such an act would be as imperative on the State courts and Judges, as on the tribunals of the Confederate States.

This position was also taken: It is admitted that should a judicial tribunal of the Confederate States, by its construction of an act of Congress, subject a citizen to imprisonment wrongfully, the State courts, having only concurrent jurisdiction, could not interfere to prevent the oppression; and, on what ground can they have any more power to prevent oppression on the part of the Executive (if we may suppose such a case) than to prevent oppression on the part of the Confederate judiciary? This reply, we think, is a conclusive answer: The judicial tribunals of the Confederate States have jurisdiction, consequently, any adjudication of those tribunals would fix the construction of the act of Congress, and the State courts could not review or reverse its decision; whereas, the executive branch of the government has no judicial power, and any construction it might give

to an act of Congress would be the subject of review, either by the State courts or the Confederate courts; and when a citizen is unlawfully deprived of his liberty or property by an executive officer, acting under an erroneous construction of an act of Congress, the State courts may give redress, as in *Slocumb* v. *Mayberry*, *sup.*

This further position was taken, and seemed to be mainly relied on: By the conscription and exemption acts, Congress invests the Secretary of War, and the officers he is authorized to appoint in order to carry them into effect, with a *quasi judicial power*, by which the enrolling officers have jurisdiction to "hear and determine" all questions which are necessary to be decided in order to ascertain whether a person is liable to conscription, or is entitled to exemption, which of course includes the power to put a construction on the acts of Congress. From the decision of the enrolling officer, there is an appeal to the commandant of conscripts, and from his decision, there is an appeal to the Secretary of War, and possibly there is an appeal to the President. This grant of judicial power is deduced from the several clauses in the acts of Congress, by which the Secretary of War is authorized "to make rules and regulations to carry the acts into effect," and from the nature of the subject, because without exercising judicial power, it would be impracticable to execute the conscription acts. This position is not tenable. There are three conclusive objections to it: 1st, Congress has no power to make the Secretary of War a Judge; or to authorize him to invest his subordinate officers with judicial power, for, as I say in the opinion delivered by me, in the matter of Meroney: "It is true, for the purpose of carrying acts of Congress into effect, the Secretary of War, in the first place, puts a construction on them, but his construction must be subject to the decision of the judiciary, otherwise, our form of government is subverted, the constitutional provision by which the legislative, executive and judicial departments of the government are separate and distinct, is violated, and there is no check or control over the executive." The circumstances growing out of the subject,

now under consideration, demonstrate the wisdom of the framers of the constitution in adopting the principle by which Congress has no authority to exercise judicial power or to confer judicial power upon a department of the executive branch of the government. The military officers appointed to execute the conscription acts are naturally prompted to increase the numerical force of the army, and for this purpose so to construe the acts as to embrace as many persons as possible. For this reason, and as a protection to those citizens who are not embraced by the conscription acts, the constitution provides a third branch of the government in which is confided the trust of expounding the law and putting a construction upon the acts of Congress, and it follows that Congress has no power to ignore the existence of this third branch of the government and confer on the executive, powers which belong to the judiciary.

2d. There is no apparent intention of Congress to confer judicial power on the Secretary of War, and authorize him to establish inferior and superior courts with the right of appeal to himself. If such had really been the intention, it would have been expressed in plain and direct terms, and the simple fact that the Secretary of War is authorized "to prescribe rules and regulations to carry the acts of Congress into effect," which power he would have had almost by necessary implication, surely cannot, when considered calmly and uninfluenced by collateral disturbing causes, be considered sufficient to confer a power on the Secretary of War totally at variance with every principle of our government.

3d. If the Secretary of War and his subordinate officers are invested with this judicial power, so as to exclude the jurisdiction of the State courts, for the very same reason it would exclude the jurisdiction of the courts and Judges of the Confederate States. No provision is made by which a case can be taken for review before the District Court of the Confederate States from these *military judicial tribunals.* Consequently, the judicial department of the government, both State and Confederate, is set aside and the liberty of the citizen depends

solely on the action of the war department and its subordinate officers. Can this be so? Surely not.

Our conclusion is, that the Court has jurisdiction to discharge a citizen by the writ of *habeas corpus*, whenever it is made to appear that he is *unlawfully* restrained of his liberty by an officer of the Confederate States; and that when a case is made out, the Court is bound to exercise the jurisdiction which has been confided to it "*as a sacred trust*," and has no discretion and no right to be influenced by considerations growing out of the condition of our country, but must act with a single eye to the due administration of the law, according to the proper construction of the acts of Congress.

Battle, J. The question presented for the consideration of the Court is, whether the courts and Judges of this State have the right to issue *writs of habeas corpus* for the purpose of inqiring into the legality of the detention of persons held in custody, by officers of the Confederate States as conscripts, under certain acts of the Confederate Congress. The constitutionality of those acts has never been judicially questioned in this State, so that the only inquiry is that which I have just stated. My opinion is decidedly in favor of the jurisdiction of the State courts, and I will endeavor to state, briefly, the process of reasoning, by which I have been conducted to this conclusion. In the exposition of my argument, it will be more convenient for me to show what were the power and authority of the courts of this State in relation to this matter, while it was a member of the United States government; for no one contends that they have less power and authority under the Confederate government.

After the American Revolution, North Carolina was a sovereign and independent State. In virtue of that sovereignty and independence, she was invested with many and great powers and prerogatives, and had imposed upon her many and important duties. Among these duties none was higher than that of protecting all her citizens in the full and free enjoyment of life, liberty and private property. Fully alive to

this duty, she, in the fundamental organization of her government, declared "that no freeman ought to be taken, imprisoned or deprived of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land." Declaration of Rights, sec. 12. And again: "That every freeman, restrained of his liberty, is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied or delayed." *Ibid*, sec. 13. To give a practical effect to these rights, courts were established and Judges appointed. Had the State been powerful enough to continue to exist as an independent nation, nothing more would have been wanted to secure the protection of her citizens. But, North Carolina, for causes not now necessary to be set forth, found it expedient to unite with other States similarly situated, for the purpose of forming a new and distinct government, and in doing so, all these States were compelled to give up a portion of their former respective sovereignties, and to invest the newly created government with them. Hence, the adoption of the constitution of the United States, in which, after the enumeration of all the powers conferred on the General Government, it is declared, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See amend'ts to Con. art. 10. This article was indeed unnecessary, as the General Government had no powers except what the States had granted to it, either expressly or by a necessary implication; but it was, out of abundant caution, very properly adopted.

We are now to inquire whether the State gave up any portion of that sovereignty, which was necessary to be retained for the purpose of enabling her to discharge the duty of protecting the personal liberty of her citizens.

As the courts and Judges furnish the means through which that liberty is to be vindicated, let us see what authority or power has been taken from them. Alexander Hamilton, a

member of the convention which formed the constitution of the General Government, and one of its ablest expounders, declared in the 82d No. of the Federalist, p. 377: "That the States will retain all *pre-existent* authorities, which may not be exclusively delegated to the Federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former as well as with the latter. And, under this impression, I shall lay it down as a rule, that the State courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes." Chancellor Kent, in the 1st vol. of his Com. p. 396, in remarking upon the rule as thus stated in the Federalist, says: "A concurrent jurisdiction in the State courts was admitted in all except those enumerated cases; but this doctrine was only applicable to those descriptions of causes of which the State courts had previous cognizance, and it was equally evident in relation to causes which grew out of the constitution. Congress, in the course of legislation, might commit the decsion of causes arising upon their laws to the Federal courts exclusively; but, unless the State courts were expressly excluded by the acts of Congress, they would of course, take concurrent cognizance of the causes to which these acts might give birth, subject to the exceptions which have been stated." Among the causes, of which the State courts had previous cognizance, none were more important than those in which they claimed the right to inquire, through the means of writs of *habeas corpus*, into the reasons for the imprisonment of persons alleged to be illegally restrained of their liberty. A jurisdiction so essential to the great privilege of going where

one may please—a privilege which every citizen of the State would wish to enjoy as freely as he did the air he breathed—the State courts would hardly have parted with, except upon the most urgent necessity. As soon, then, as a citizen of the State was supposed to be illegally restrained of his liberty by an officer of the General Government, under color of a law of Congress, we might have expected that the State courts would promptly and anxiously inquire whether they had been deprived of their jurisdiction over the matter. They would ask, had it been taken away by an exclusive authority, granted in express terms to the courts of the Union?

If, for instance, it were the case of a soldier unlawfully enlisted into the army, the answer would be in the negative. They would then ask: was it a case where a particular authority was granted to the courts of the Union, and the exercise of a like authority prohibited to the courts of the States? The answer would be still in the negative. They would then ask: was it a case where an authority was granted to the courts of the Union, with which a similar authority in the courts of the States would be utterly incompatible? That was considered to be a debateable question, and it was debated with great zeal and ability in almost every State of the Union for many years. The result was in favor of the jurisdiction of the State courts, and was thus announced by Chancellor Kent in the 1st Ed. of his Commentaries, and was so published in each successive edition of his work until his death. (See 1 Kent's Com. 400–401.)

"In the case of *Ferguson*, (9 Johns. Rep. 239,) an application was made to the Supreme Court of New York, for an allowance of a *habeas corpus* to bring up the party alleged to be detained in custody by an officer of the army of the United States, on the ground of being an enlisted soldier; and the allegation was that he was an infant and not duly enlisted. It was much discussed, whether the State courts had concurrent jurisdiction by *habeas corpus*, over the question of unlawful imprisonment, when that imprisonment was by an officer of the United States, by color or under pretext of au-

thority of the United States. The Supreme Court did not decide the question, and the motion was denied on other grounds, but subsequently in the matter of *Stacy*, (10 Johns. 328,) the same Court exercised jurisdiction in a similar case, by allowing and enforcing obedience to the writ of *habeas corpus*. The question was, therefore, settled in favor of a concurrent jurisdiction in that case, and there has been a similar decision and practice by the courts of other States." See also Hurd on Habeas Corpus, Book 2, chap. 1, sec. 5, where many cases are stated, which show the correctness of Chancellor Kent's assertion.

To the cases mentioned by Hurd may be added that of *Mason*, decided in this State, and reported 1 Murph 336. The question of the compatibility of the jurisdiction of the State courts with that of the courts of the United States, seems thus to have been proved conclusively by long experience of their harmonious action, and the general acquiescence of the country in it.

But it has been recently said that this is all a mistake, and that the decision of the Supreme Court of the United States in the case of *Ableman* v. *Booth*, 21 How. 506, is directly opposed to the supposition of a concurrent jurisdiction in the courts of the State with those of the Federal government. With the decision of that case I entirely concur; and I think that it is clearly shown in the opinion of the Chief Justice of this Court, filed in this case, that the remarks of Ch. Justice *Taney*, in giving the opinion of the Supreme Court of the United States, cannot fairly be construed to sustain the doctrine contended for by the supporters of the exclusive jurisdiction of the Federal courts.

Another case recently decided by the Supreme Court of Alabama has also been invoked to the aid of those who oppose the concurrent jurisdiction of the State courts. The case is that of *Ex parte Hill*, decided at the last January term of the Court, and reported and published in pamphlet form by Mr. Shepherd, the reporter of the Court. An attentive examination of the case will show, that though the decision of

the Court is right, it cannot be used as an authority for the purpose for which it has been cited. I will premise that the Court is composed of three Judges, of whom only the Chief Justice, A. J. Walker, and Stone, Judge, were present, the other Judge, R. W. Walker, being detained at home by providential causes. The Court agreed in the conclusion that the Judge, whose action they were reviewing, should not issue the writ of *habeas corpus* upon the petition before him. The Chief Justice put his opinion upon the ground of a want of jurisdiction in the courts of the State, but Judge Stone expressly said, "I withhold the expression of any opinion on all those cases, in which the party, either by name, or as one of a class or sect, stands, absolutely and unconditionally, exempt from conscription, without any other qualification than that he is of the given class; such, for example, as persons under the age of eighteen years or over forty-five, officers judicial and executive of the Confederate and State Government, &c." The Judge then went on with his argument to show that the petitioner in the case before the Court was not exempt from conscription under the law of Congress. In doing so, it seems to me, he, himself, as a member of the Court, was assuming a jurisdiction of the case. If he had the right to construe the act of Congress for the purpose of ascertaining that the party was not entitled to exemption, he had the same right to construe the act, if his construction led to the conclusion, that the party was exempt. A power to construe the act at all, involves, necessarily, a jurisdiction in the Court. If this be so, then the Court was equally divided upon the question of jurisdiction, and, therefore, there was no decision either way upon that question.

Another case reported in the same pamphlet, and, I suppose, decided at the same term, shows manifestly that the Court assumed and exercised jurisdiction over the cause. The case is that of *Ex parte Stringer*. The party being in custody as a conscript, applied for a writ of *habeas corpus* upon the ground, that he was a regular member of the "Christian Church," and had conscientious scruples against bearing arms.

Stone, Judge, delivered the opinion of the Court, in which it was decided that the acts of Congress, known as the "Conscription laws," were constitutional; and that the petitioner did not come within any of the exemption clauses of those laws. The opinion closes thus: "As the opinion of the entire Court is not yet announced, nor indeed formed, on the broad question of the jurisdiction of the State courts in cases like the present, and as we feel no hesitation in refusing the present application on the merits, we place our refusal on the ground stated above. The prayer of the petitioner is denied."

If the Court had no jurisdiction of the cause, I should like to know how it acquired the power to decide the case upon its merits? From this examination, it is manifest, I think, that neither the Alabama case, nor that of *Ableman* v. *Booth*, has lessened, in any sensible degree, the weight of authority in favor of the concurrent jurisdiction of the State courts in cases like that now under consideration.

In closing this opinion, I will take occasion to return my thanks to the counsel on both sides, for the aid which they have given to the Court by their able and well considered arguments.

Afterwards, the Court invited an argument from the bar upon this question: whether this Court, as such, had the power to issue a writ of *habeas corpus*, and to determine of the case in open court.

Mr. Moore, argued in favor of the jurisdiction as follows:

There has been no time since the organization of Government in the State, 1666–7, when this writ, so precious to freemen, did not run among us.

1. The second charter of Charles 2nd, (1667,) (2 R. S. 4,) granted to the "Proprietors" the power "by Judges to award process, hold pleas, and determine all actions, suits and *causes* whatsover, as well criminal as civil, real, mixt, personal, *or of any other kind or nature whatsoever.*" The *courts* of England did issue writs of *habeas corpus* before 31 Ch. 2, and perhaps the Judges in *vacation*, Bac. Abr. Hab. Corp, B. 13.

2. Though this statute (passed in 1679) did not extend to the Colonies, the Colonial Legislature of 1715 (Rev. Code of 1820, c. 5, s. 3) declared in force in the colony all laws of England "providing for the privileges of the people." See Ired. Rev. p. 17, ch. 31. This emphatically introduced the act of 31st Charles, and thenceforth it is clear, that both courts, and Judges in vacation could issue the writ.

3. In December, 1776, the Convention which framed the State Constitution declared, among the rights of the people, "that every freeman restrained of his liberty, is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be delayed." Decl'n Rights, sec. 13. This language alone, would have given birth to the writ, if before that time it had been unknown. It is, however, nothing more than a declaration of the *unremitting* force of the then well known great writ of personal liberty, *and a prohibition against its suspension.* The language, so far as concerns the remedy, is addressed to the judicial authorities of the State.

4. In April, 1777, the act (R. C. of 1820, ch. 115, sec. 2,) called the "court law," was enacted (or rather the previous acts revised and consolidated) which, in conferring power on the Judges, declares that "they shall have, use, exercise and enjoy the same powers and authorities, rights, privileges and pre-eminences, as were had, used, exercised and enjoyed by any former Judges of the superior courts," &c. This and the 13th section of the Declaration of Rights, and the statute of 31 Charles, did most certainly secure the full benefit of the writ, both in term and vacation.

5. In 1818, (Rev. Code, chapter 33, the present Supreme Court was established, with powers defined both for the Judges, and the Court. As Judges, it is provided by sec. 5, "that they, and each of them, shall have, use, exercise and enjoy the same powers and authorities, rights, privileges and pre-eminences," &c., as were had, used, exercised and enjoyed by Judges of the superior courts, except that none of them should hold a superior court. This gave them the power to

issue writs of *habeas corpus*. As *a court*, among other powers, they were vested (section 6) with the "power to issue writs of *certiorari*, *scire facias*, *habeas corpus*, *mandamus*, and all other writs which may be proper and necessary for the exercise of its jurisdiction and agreeable to the principles and usages of law." No one ever doubted that before the Revisal of 1836, the Judges had power to issue writs in vacation.

The quoted language of sec. 6, was evidently borrowed from sec. 14, of the Federal Judiciary act of 1789.

Under that act and up to the establishment of our Supreme Court, the Federal Supreme Court was accustomed to issue the writs without reference to any case under its immediate jurisdiction, or which could come under it; *Ex parte Bollman*, 4 Cr. at 101.

In the *United States* v. *Hamilton*, 3 Dall. 17, (1795,) the prisoner charged with treason, had been committed upon the warrant of the *District Judge* of Pennsylvania—the Court issued the writ and discharged him on bail.

In *Ex parte Burford*, 3 Cr. 448, (1806,) the prisoner had been committed to jail in the District of Columbia, in default of finding security for good behavior. He was brought up and discharged, because the warrant did not state "*some good cause certain, supported by affidavit.*"

In *Ex parte Bollman*, 4 Cr. 75, (1807)—prisoner committed upon a charge of treason; writ issued by Supreme Court after elaborate argument, and prisoner discharged.

In *Ex parte Kearney*, 7 Wheat, 39, (1822,) the doctrine in *Ex parte Bollman*, is affirmed.

The jurisdiction is said to be *appellate*, because the writ supervises the commitment by an inferior tribunal—this is a refinement; *Ex parte Metzger*, 16 Curt. 352.

It took jurisdiction in all cases of a technical appellate character, except when the defendant was in confinement under the proceedings of a court of competent jurisdiction; *Ex parte Watkins*, 3 Pet. 201.

6. Without any grant to issue the writ, the Court would have had the power from its very constitution; the dis-

trict courts, composed of three Judges, possessed it, though never specially conferred; Rev. Code, 1820, chap. 115. The grant was made of abundant caution. The words, "which may be proper and necessary for the exercise of its jurisdiction," refer not to the writs named, but to the antecedent words, "and all other writs;" *Ex parte Bollman*, at 101. It is clothed with an independent power to issue writs of *habeas corpus*, *mandamus*, &c.

7. If the Court can exercise similar jurisdiction to that exercised by the Supreme Court of the United States, in *United States* v. *Hamilton*, *Ex parte Burford*, *Ex parte Bollman*, it concedes the question, and admits the power in the Court to issue in all cases of illegal confinement where no *court* has taken jurisdiction of the case.

Mr. Strong, District Attorney of the Confederate States, with whom was *Mr. Bragg*, argued as follows:

Has the Supreme Court jurisdiction to issue the writ of *habeas corpus*?

The settled opinion of the profession, including the Judges of the Court itself, seems to have always been against the jurisdiction, as is shown by the fact, that no attempt has ever been made to exercise it, and that writs of the kind have been issued and acted upon by the individual judges during the session of the Court.

1st. It is contended that the Court has this jurisdiction by the Common Law, it being "incident by that law to every Superior Court of Record." This reasoning would be valid if the jurisdiction of the Court were to be determined by the Common Law. But this is not the case. The powers of all our courts depend solely upon the statute which creates them. The *Common Law itself*, in this State, depends for its force upon a statute. Rev. Code, chap. 22. And the Legislature could uproot it to-morrow, and establish the code of Napoleon in its stead. There is the same kind of difference between a Court of Record, in England, and in this State, that there is between corporations. *Trustees of Davidson College* v. *Chambers' Executors*, 3 Jones' Eq. 268.

The clause in the bill of rights that "every freeman restrained of his liberty is entitled to a remedy to enquire into the lawfulness of such restraint, and to remove the same, if unlawful, and such remedy ought not to be denied or delayed," is certainly satisfied by the grant of power to the eight circuit judges, both in term time and in vacation, and to the three Judges of this Court, in vacation, to issue and act upon the writ. The obligation of the State Legislature to protect the citizen in the enjoyment of the two great rights of personal security, and private property, is *perfect.* The obligation, as to the third great right of personal liberty, cannot be rendered *more* than perfect, by the above clause of the Bill of Rights. And the establishment of a Supreme Court by the constitution, though aided by the clause in question, can no more give that court *original* jurisdiction to protect one of these rights by *habeas corpus*, than to protect the others by writs of replevin, &c.

That the Superior Courts, in term time, have the right to issue writs of *habeas corpus*, is manifest from the statute which confers general jurisdiction; Rev. Code, chap. 31, sec. 17, and from sections 4 and 5 of chap. 55 of the Rev. Code.

2d. It is contended that the jurisdiction is conferred by the statute. That portion of it, material to our enquiry, is as follows: The court shall have "power to issue writs of *certiorari*, *scire facias*, *habeas corpus*, *mandamus*, and all other writs which may be proper and necessary for the exercise of its jurisdiction, and agreeable to the principles and usages of law." It is admitted that the easy natural construction, which the learned and unlearned would place upon this sentence, is that the writs enumerated, are only those which are ancillary to the other powers of the Court, and necessary to the exercise of its jurisdiction. For it is a settled principle, of both legal and grammatical construction, that the words, "all other writs," following an enumeration of particular writs mean "all other *such* writs." Owen's on Statutes, 9th Law Library 777; 2d Rep. 46; *State* v. *Weaver*, Busb. 13. So that the sentence may fairly be translated, "all other writs *such as*

the above," or "all other writs which *like the above*, may be necessary, &c.. To this, it was objected by *Mr. Moore* and *Mr. Winston*, that no cases could be conceived in which *all* the enumerated writs could be used in an ancillary character, and that, therefore, they must have been intended to be used without restriction. The main force of the argument was spent upon this point, but it fails totally. As to the first two, there is no difficulty. As to the writ of *habeas corpus*, it would certainly lie to bring up a witness to testify, where his presence would be necessary, under sec. 15, chap. 33, Rev. Code, or to bring up to answer, a defendant in a writ of *capias ad satisfaciendum*, issued from this Court, who had given bond for his appearance, and had been imprisoned upon process issuing from another court. As to the writ of *mandamus*, when upon an appeal to this Court, the judgment is, that the peremptory writ issue, it then becomes necessary to the exercise of this Court's jurisdiction, and is ancillary in its character. It may also be used to compel the the Superior Court to send up a record, or to do any other duty. Bacon's Abridgment, Letter A, p. 419.

It is asked by the counsel, why enumerate these writs in the statute, if of a secondary character, since, in that case, they would be included in the general words, "all writs necessary and proper to the exercise of its jurisdiction"? In answer, it may be asked why insert these general words themselves, since, without them, the Court would have had the power which they profess to confer?

The construction now contended for, has been placed upon the act, by this Court, *Jones* v. *McLaurin*, 7 Jones 392. In that case, it was decided that a writ of *scire facias* would not lie against bail, *because* that was an original proceeding, and it was not necessary to the exercise of the jurisdiction of the Court. The writs enumerated in the *same clause*, must of course stand upon the same footing. And, if the Court cannot, for the above reason, exercise an original jurisdiction in issuing the writ of *scire facias*, it cannot, for the *very same reason*, do so, in issuing the writ of *habeas corpus*.

Section 14 of the Judiciary Act of the United States, which confers jurisdiction upon the Supreme Court, is nearly identical in language with our own. That act has received the construction now insisted on. *Ex parte Bollman and Swartwout*, 4 Cranch 75; *Ex parte Metzger*, 16 Curtis 348.

If it be an absurdity, that a single judge can do in vacation what the whole court cannot do in term time, the fault is with the Legislature. But it may have been well intended that this tribunal should, during term time, be only employed with those questions, the decision of which, by an inferior tribunal, had failed to give satisfaction.

No necessary conflict of decision, will arise out of this construction. From the judgment of a superior court, in term time, an appeal will lie to the Supreme Court; Rev. Code, chap. 4, sec. 21. In the mean while, the prisoner will be *in custodia legis*, Hurd on *Habeas Corpus*, p. 324, and the Court may either take his recognizance for his appearance, at its next term, or before the Supreme Court, to perform the final judgment. It is believed, upon the equity of the statute regulating appeals, above quoted, and the general principles governing the writ of recordari, that by that writ, the decisions of any judge in vacation might be brought to this Court for review. The writ was thus used in Wisconsin to bring up for review the decision of one of the Justices of the Supreme Court of that State; *Ableman* v. *Booth*, 21 How. 506. But, if the evils from the conflicting decisions of the judges out of court cannot be thus remedied in this case, neither can they in the other.

Mr. P. H. Winston, Sen'r., in favor of the jurisdiction, argued as follows:

Every Court of general jurisdiction in civil cases, has power to issue writs of *habeas corpus*. It belongs to the courts of Chancery, Common Pleas and Exchequer as well as the King's Bench; Bac. Abr. Hab. Corp. B. 2; Com. Dig.; *Bushel's case*, Vaughan, 155; *Wood's case*, 3 Wilson, 172.

This jurisdiction is not derived by implication from 31 Car. 2, for *Bushel's case* was before that statute, and in *Wood's*

case, it is treated by the Court as inherent in every court of superior jurisdiction. It is founded on the principle of the common law, thus expressed in our State Constitution, "Every freeman restrained of his liberty, is entitled to a remedy to enquire into the lawfulness thereof, and remove the same if unlawful, and such remedy ought not to be delayed or denied;" Declaration of Rights, sec. 13.

2. Our Habeas Corpus Act, Rev. Code, ch. 55, by giving power to each Judge of the Supreme and Superior Courts to issue the writ, by necessary implication gives the power to the courts. This power is assumed by section 5, to exist in the Superior Courts, either by common law or by force of that Act.

3. The power is expressly conferred by the act, creating this Court, Rev. Code, ch. 33, sec. 6. After defining its appellate jurisdiction, the act declares that it shall have original and exclusive jurisdiction in repealing letters patent, and shall also have power to issue writs of *certiorari*, *scire facias*, *habeas corpus*, *mandamus*, and all other writs, which may be proper and necessary for the exercise of its jurisdiction, and agreeable to the principles and usages of law." "Habeas corpus" in this clause, means *habeas corpus ad subjiciendum*, &c.— This is a grant of the substantive power to issue writs of *habeas corpus*. It is associated with jurisdiction, undeniably original; (to repeal letters patent.) No case can be stated in which this writ can be needed, or useful for the exercise of its appellate jurisdiction, or its original jurisdiction in other matters. It is consistent with the grammatical construction of the sentence. The words, "which may be proper and necessary for the exercise of its jurisdiction," &c., have for their antecedent "all other writs." This clause is a copy of the 14th section of the Judiciary Act of the United States, with the exception of a few words, which cannot vary the construction, and in the case of *Ex parte Bollman* and *Swartwout*, 4 Cranch, 75, the Supreme Court of the United States decided that that section conferred on that Court a substantive power to issue the writ

for the purpose of obtaining jurisdiction and exercising it in cases not otherwise within its cognisance.

Unless this construction be adopted, the citizens of this State have no such efficient remedy for unlawful restraints of their liberty, as the 13th sec. of the Declaration of Rights, makes it the duty of our Legislature to provide. A Judge out of court, has not the means of fully investigating cases or of enforcing his decisions. His judgments cannot have the requisite authority, efficacy or publicity, and the superior courts sit but twice a year for a week each time.

Pearson, C. J. At the beginning of the term, the Judges requested the members of the bar to investigate the subject and give their opinions and their reasons for them *pro* or *con*, on this question: Has the Court jurisdiction to issue a writ of *habeas corpus*, returnable to the Court, and thereupon to inquire of the lawfulness of any restraint put on the liberty of a citizen. We have been favored with the opinions of Messrs. Moore and Winston in favor of the jurisdiction, and of Mr. Strong against it, and the subject has been fully discussed. After giving it due consideration, we are of opinion that the Court has jurisdiction.

This conclusion is put on two grounds:

1st. The Court has jurisdiction by common law. The laws of our State rest for a foundation upon the common law of England. It is an admitted principle of the common law, that every court of record of superior jurisdiction has power to issue the writ of *habeas corpus*, which is the great right for the protection of the liberties of the citizen.—This "power is an incident to every superior court of record." 3 Wilson, 172; 3 Bac. Abr., title *Habeas Corpus*; notes. It arises from the obligation of the King to protect all of his subjects in the enjoyment of their right of personal liberty, and for this purpose to inquire by his courts into the condition of any of his subjects. As this duty of the King in regard to any of his subjects, confers on every court of record of superior jurisdiction the power to issue the writ, as incident to its

existence, it follows that the duty of the State of North Carolina in regard to its citizens, must confer a like power on all of its courts of record of superior jurisdiction, as incident to their existence; for surely, under our Constitution and Bill of Rights, in which is reiterated the great principle of *Magna Charta*, "every free man restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful, and such remedy ought not to be denied or delayed." The personal liberty of our citizens must be equally as well protected and secured as the personal liberty of the subjects of the King of England.

Our Constitution vests the legislative power in a General Assembly; the Executive power in a Governor, and the Supreme Judicial power in a Supreme Court; so that the establishment of a Supreme Court, without any words to that effect, necessarily and as an incident to its existence by force of the Bill of Rights, of the Constitution and the principles of the common law, invests it with power to inquire by means of this great Writ of Right into the lawfulness of any restraint upon the liberty of a free man, and if in establishing a Supreme Court, the Legislature had in express terms denied the Court the power to issue this writ and prohibited it from so doing, such prohibition would have been void and of no effect.

Our conclusion that the Supreme Court has power to issue the writ is confirmed by a consideration of the provisions of the *habeas corpus* Act, Rev. Code, chap. 55. It is taken from two English Statutes, 31 Charles II and 56 Geo. III. We have seen that all of the Superior Courts of England had power by the common law to issue the writ, but the *courts* could only act in *term time*, and a free man might be unlawfully imprisoned in vacation time, so the remedy would be delayed, and to provide the means of speedy inquiry into the cause of imprisonment, it is enacted by 31 Charles II, that every Judge of all the courts of superior jurisdiction, on the application of any person imprisoned upon a criminal charge, (unless after conviction,) shall in the vacation time, under a pen-

alty of five hundred pounds grant a writ of *habeas corpus*, returnable without delay, and by 56 George III it is enacted, that all of the Judges shall, in the vacation time, under a like penalty, in the same manner grant the writ on the application of any person imprisoned or restrained of his liberty for any cause other than a criminal charge. So in England any person, whether imprisoned on a criminal charge or restrained of his liberty for any other cause, had a right during the sitting of the courts, by application to the Court, and during the vacation by application to any one of the Judges, to have the cause of his being imprisoned or restrained of his liberty inquired into without delay.

Our *habeas corpus* Act, as before observed, is taken from these two English Statutes, and not only gives power to, but requires, under a penalty of twenty-five hundred dollars, any Judge of the Supreme or Superior Courts in the *vacation time*, to issue the writ of *habeas corpus* on the application of any person imprisoned on a criminal charge or otherwise restrained of his liberty.

It is manifest that this act pre-supposes that both the Supreme and the Superior Courts had power in term time to issue the writ, and the intention was to extend the remedy to the vacation. This must be a declaration by the Legislature of the fact that both the Supreme and the Superior Courts had power to issue the writ, or we must adopt the absurdity, that the Legislature intended to give to a single Judge in vacation, a power which the Court did not possess in term time, and we can only account for the fact that while giving this power to the Judges in vacation, the Legislature did not in express words confer a like power on the courts, upon the ground that it was taken for granted that our courts, like those in England, already had the power; for under the unrestricted legislative power of the General Assembly, it not only had the power, but it was its duty by the Constitution and Bill of Rights to confer this power on both the Supreme and Superior Courts, if the Courts did not already possess it.

2d. Suppose, for the sake of argument, it was necessary that

the power should be conferred on the Supreme Court by statute, we are of opinion that it is conferred by the Act establishing the Court; Rev. Code, chapter 33, section 6. It is in these words: "The courts shall have power to hear and determine all questions of law brought before it by appeal or otherwise from a superior court of law and to hear and determine all cases in equity brought before it by appeal or removal from a court of equity, and shall have original and exclusive jurisdiction in repealing letters patent, and shall also have power to issue writs of *certiorari*, *scire facias*, *habeas corpus*, *mandamus*, and all other writs which may be proper and necessary for the exercise of its jurisdiction and agreeable to the principles and usages of law."

There are several kinds of writs of *habeas corpus*: inferior ones, to enable the Court to exercise its jurisdiction, for instance, *ad testificandum*—to bring a man out of jail to be a witness; and the great Writ of Right, *habeas corpus* to bring any citizen alleged to be wrongfully imprisoned or restrained of his liberty, before the Court, with the cause of his arrest and detention, that the matter may be inquired of and the party set at liberty if imprisoned against law. This proceeding is original, and in no wise connected with or dependent on any other matter over which the Court has jurisdiction.

The question is: Does the Act restrict the power of the Court to writs of the inferior sort, or does it confer power to issue the great Writ of Right?

In support of the first construction, it is urged that the words, "*all other writs* which may be proper and necessary for the exercise of its jurisdiction," show that the writs before specified, were intended to be of the same kind, and must have the effect of restricting the power to writs of the inferior sort. Several considerations are urged in reply: In strict grammatical construction, the restrictive words, "which may be proper and necessary for the exercise of its jurisdiction," refer to the last antecedent "*all other writs*," so as to make the true reading (supplying the elipsis,) "and shall also have

power to issue all other writs which may be proper and necessary for the exercise of its jurisdiction." This further reply is made: If the intention was merely to give power to issue the inferior writs necessary to the exercise of its jurisdiction, (which power every court in fact has, by implication,) it was sufficient to say, "and the Court may issue all such writs as may be necessary for the exercise of its jurisdiction." Instead of this simple clause immediately following the grant of original jurisdiction to repeal letters patent, comes this formal commencement: "and shall *also have power* to issue writs of *certiorari*, *scire facias*, *habeas corpus*, *mandamus*." Why this formal announcement of substantive grant of power? And why are there four writs particularly named, if the object was merely to authorize the Court to issue the inferior sort of writs?

In questions of this kind, the Court is not confined to the narrow field of the import of words, construction of sentences and rules of grammar, but may draw to its aid considerations of a more comprehensive nature, and if due weight is given to the power of the Legislature—its duty—the object in view and the nature of the subject—the conclusion is irresistible, that it was the intention to give the Court power to issue the great "*Writ of Right*."

The power of the Legislature in respect to the jurisdiction it was about to confer on the Supreme Court then to be established, was unlimited—it had the same power to confer original as appellate jurisdiction.

It was the duty of the Legislature under the Bill of Rights and the Constitution, to provide in the most ample manner for the protection of the liberty of "all free men." The object in establishing a Supreme Court, was to provide the tribunal best calculated to secure uniformity and correctness of decision in respect to all questions involving "rights of person" and "rights of things." This it was supposed could be accomplished by a Court composed of three judges. From the nature of the subject, in actions at law, and indictments where the facts must be tried by a jury, it was seen to be impracti-

cable for the Supreme Court to exercise original jurisdiction. Hence, it was deemed expedient, that all actions and indictments should originate in the lower courts, where the facts can be found so as to present to the Supreme Court only questions of law by way of appeal: In suits in equity where, although the facts are sometimes complicated, the mode of trial is by the court, it was deemed expedient that the proceedings should originate below and then be brought up by appeal or removal after being set for hearing. So, in respect to these remedies only appellate jurisdiction is conferred.

There remained a fourth distinct and important subject of jurisdiction, to wit: the writ of *habeas corpus*. From its nature, no complicated state of facts can be presented, so that consideration presented no objection to the grant of original jurisdiction to the Supreme Court. While on the other hand, as all of the Judges of the Supreme and Superior Courts had power to issue such writs and decide upon the lawfulness of the imprisonment, in order to prevent conflict of decision and utter confusion and chaos, and to give uniformity and correctness to decisions involving the liberty of the citizen, the necessity of conferring original jurisdiction on the Supreme Court to issue the writ, and decide on the right, was patent; and, if the statute in question does not confer the power, no reason can be assigned for the omission: unless it was the opinion of the Legislature that the power would attach to the Court as soon as it was established, as an incident of its existence, upon the principles of the Common Law and Bill of Rights.

The Legislature had full power. It was its duty—there was a patent necessity—the object in establishing the Supreme Court could not otherwise be fulfilled, and no objection to it could be suggested. It follows that the Court has the power, either on the ground that the statute confers it, or the omission to do so is a legislative declaration that the Court possesses the power as incident to its existence.

On the able argument with which we have been favored by Mr. Strong, he called attention to the fact that the act of

Congress, 1789, establishing the Supreme Court of the United States, used nearly the same language as the act of the Legislature establishing the Supreme Court of this State, and that in the construction of the act of Congress, the Supreme Court of the United States have decided that the Court cannot issue the writ of *habeas corpus*, except where the writ is incident to an appellate jurisdiction.

That is true, and it seems to account for the general impression which has prevailed in this State against the power of the Court. The fact that so many applications have been made to the Judges for writs of *habeas corpus*, during the last few months, has directed attention to this subject, and a closer and more serious investigation than the subject had before received, results in the conclusion that the Court has the power, and that the erroneous impression which had prevailed, is to be ascribed to the circumstance that due weight had not been given to the difference between the two Courts in regard to the *sources* from which jurisdiction may be derived. The Supreme Court of the United States can derive no jurisdiction from the principles of the Common Law. Its jurisdiction must rest solely on acts of Congress, and the power of Congress to confer jurisdiction rests on the constitution of the United States. It can have no power except that which is conferred by the constitution, and by it the power to establish a Supreme Court, is restricted to a court of *appellate jurisdiction*, except in cases affecting embassadors, &c., art. 3, sec; 2.

The very reverse of all this is the case in respect to the Supreme Court of the State. It may derive its jurisdiction from the principles of the Common Law. The power of the Legislature to confer jurisdiction is unlimited, and there is no reason why it should not, if deemed expedient, have established a Supreme Court with full original jurisdiction, or one with jurisdiction partly original and partly appellate.

In the opinion of Judge Marshall, *Ex parte Bollman*, 4th Cranch 98, 2 Curtis 24, a full and critical examination is made of the act of Congress, and he comes to the conclu-

sion, that by its true construction it would confer on the Supreme Court jurisdiction to issue the writ of *habeas corpus*, but for the fact that it was to be construed in reference to the limited power of Congress. Our act, on the contrary, is to be construed in reference to the unlimited power of the Legislature, and in this view the opinion of Judge Marshall strongly supports the conclusion to which we have arrived.

Mr. Strong also cited the case of *Jones* v. *McLaurin*, 7 Jones, 392. That was a *scire facias* against bail, and the Court decide that it has not jurisdiction, because the *scire facias*, as there used is, in effect, an action of debt, in respect to which the Court has only appellate jurisdiction. The question we have before us is plainly distinquishable. The *habeas corpus*, is totally distinct in its nature from any action at law, or proceeding in the nature of an action, or suit in equity, or indictment, and is put by us on grounds peculiar to itself.

Our conclusion is, that the Court has power to issue writs of *habeas corpus*, returnable to the Court, and thereupon to inquire of and decide upon the lawfulness of any restraint put on the liberty of a citizen. This opinion does not affect the question of the jurisdiction of a State court where the arrest is justified on the authority, or by color, of an act of the Congress of the Confederate States. That question may be the subject of future consideration.

Afterwards, the cause was taken up on its merits.

Mr. Moore, with whom was *Henry C. Jones*, for the petitioner, argued as follows:

1. In the view of able lawyers, the substitution involves a contract with the Government: they maintain that the provision that substitutes, not liable for duty, might be received for such as were, with a knowledge by the law-maker, that the substitution would be attended with heavy sacrifice of money, is equivalent to a declaration by the Government, that those who would buy substitutes should be discharged from services for such time as the substitute should be put in.

Did not the Government intend to pledge its faith to this extent, or allow it to be so understood? It is certain that many arts were resorted to to make the law less distasteful, as may be seen in sections 1, 4, 6, 7, 8, 9, 13. Government, under the orders it established, was a great gainer by substitution. It took under order 58, all conscripts, though "not fit for all military duty," that were able to serve for nursing and similar duties: maimed men were taken; but none such were allowed to become substitutes—none, unless they were "sound and in *all* respects fit for military service." The fact is notorious, that a sound man is never wittingly exchanged for a worse one, though liable to duty: the bargain is always the other way—this practice of considering every man, *not bedridden*, fit for service, has driven thousands of invalids to resort to substitution to save themselves from death by the hardships of the service. But it is said that Congress could have intended no such bargain, because it was expected that from the boasts of the enemy, the country would need every available man. This was not the expectation—neither the press nor public councils held out any such idea. We were constantly told that peace was but two or three months ahead; and the law itself stopping short by ten years of the ordinary military age, ignores any such idea. It is yet five years short of the allowed extent. It was at least reasonable for him who was invited to the privilege of putting in a substitute, to expect that, if the age of conscription were extended, those who were neither in the service, nor had hired substitutes, would be first called. It had been mere mockery to allow so short a respite to the conscript after prescribing to him that his substitute must be put in (and of course be paid) for *three years or the war*. Did not good faith require of the Government some distinct expression if such had not been its meaning.

It is suggested that if such had been its purpose, Congress was incompetent to pledge the national faith for its sanction, and that a succeeding Congress might in good faith annul the bargain. If Congress may make war, it may certainly, with-

in the scope of its powers, determine the *mode* of raising armies. It may enlist upon what bounty, whether in money or privileges, it may please. It may borrow money and pledge the entire revenue to fill the treasury. It may procure the services of the citizen for two years by agreeing to discharge him for the third. It may grant or withhold supplies both of men and money. In a word, it can stop a war—and it is no answer that another Congress would not be bound, because of the disastrous consequences of the acts of the previous one. A nation's faith is, to a great extent, its wealth; and it will be worthless, if, after pledging it, the public authority shall violate it, because the bargain is *hard*. Such a nation could not be trusted in war. Its soldiers taken in battle would be put to the sword, because it kept no faith. I admit a difference in a bargain between a nation and its citizens, and a bargain between two nations. The former may be violated if necessary in a very urgent case, upon making compensation; the latter must be submitted to, if fairly made. But no people could either love or respect its rulers who should lure them to action by promises and break them without overwhelmning necessity, or liberal compensation.

2. But if there be no contract, only those who, when the calls are made, are not "legally exempted from military service," can be called into service. Now, who, on 27th September, 1862, and before the passage of the act of that date, were "legally exempted?" To determine this question, we must look to previous legislation. The act of 16th April, 1862, sec. 9, exempted all conscripts between 18 and 35 years of age, who might put in substitutes "not liable for duty," under that act. The act of 21st April, 1862, exempted (among other persons) mail carriers and ferrymen. Though exempted by different enactments, the exemption of each was secured by *law*—and neither of the persons, thus exempted, could be put into service so long as this legal right of exemption continued. On this footing, they stood alike on 27th September, 1862, when the second conscript act was passed, which subjects to conscription all persons between 35 and 45 years of age, who are

not at the times of the calls for them "legally exempted from military service." It is certain that the mail carrier and ferryman did not become liable to be conscripted under this act. The only reason why they did not, is because they were "legally exempted from military service" under a law still in force. This being granted, how then does the person who had put in a substitute become liable? The law of 27th Sept. 1862, which extended the age to 45 years, and did but amend the law of April, 1862, which had given exemption on putting in a substitute, did not profess to take away any privilege of those who, before that time, had been exempted by law. Now, if the mail carrier and ferryman, between those ages, were still excused, it was because they had been legally exempted by an act which had not been repealed; and in like manner had been exempted, the principal putting in a substitute, by virtue also of an act which had not been repealed. In a word, did the act of September 27, intend to look to the then *status* of those who had been "legally exempted," or to some new status introduced in the act? The only term used concerning exemption evidently has reference to an existing status, and not to one then introduced.—In regard to mail carriers and ferrymen, it is manifest that the act designed to look to a *previously created status*; and by what rule of legal interpretation can we exclude other persons having a like previously created legal exemption, unless some other words may be found indicating that purpose? There are none.

3. But it is said, that though such be the proper interpretation of the act *per se*, yet the Secretary at War is authorised to regulate substitution as he may deem advisable; and I am referred to section 9, of the conscript act of 16th April, wherein it is provided "that persons not liable to duty, may be received as substitutes for those who are, under such regulations as may be prescribed by the Secretary of War." On the 19th May, 1862, the Secretary published certain regulations, (General orders No. 37,) among which, by paragraph 4, it is provided, that the exemption gained by putting in a sub-

stitute shall be "valid only so long as the said substitute is legally exempted." I have endeavored to show that the exemption, by the act, is for three years or the war, without reference to the time when, if out of service, the substitute would become liable. It is contended, that however right, abstractedly considered, this interpretation may be, yet, the Secretary is invested with a power over substitution, which enables him, by regulations, to modify the legal interpretation of the act itself, and that he may shorten or prolong the time of exemption by substitution. If so, then he is invested with a vigorous faculty of legislation indeed. A faculty to make a regulation inconsistent with the very law which empowers him to regulate! The right in time of war to substitute another in the place of the drafted soldier has been known to, and exercised by, our people at all times; and when it was provided that "persons not liable to duty may be received as substitutes," it was intended to confer a privilege on the conscript, and not to allow to the Secretary of War a pure discretion to receive or not, as he might please. Under the clause, he is *bound* to receive in substitution "persons not liable for duty," and the only discretion conferred on him, is to regulate the mode and manner by which they shall be *received*. He has no power to allow one substitute for a month, another for a year, and third, for the war. When substitutes are received, they are to be *full* substitutes, and are to occupy the *entire* place of the principal. The Secretary cannot halve the substitution. There has been, heretofore, no such substitution, though, at all times, it is necessary to ascertain his fitness, and regulate the mode of receiving the substitute. The law, itself, selects those who are fit for substitutes, by declaring that they are "persons not liable to duty," and, submits to the Secretary only the power to provide for the mode and manner of receiving them into the service. It may be regarded as quite clear, that the act did contemplate as fit substitutes all such as were citizens or domiciled residents, and were able to bear the fatigues of war, and who might lawfully volunteer in the service. And it is equally clear, that while the persons

are such as are "not liable to duty," they must, in the nature of things, be fit for duty. It is asked, why is not the principal also discharged when a minor under 18 is the substitute? I think there is a manifest difference in the cases. I do not place it on the recent regulations of the Secretary of War.—In the first place, at the time of the passage of the conscript act, it was an army regulation that persons under the age of eighteen, were not receivable into the army as recruits; (see Army Regulations of Confederate States, sec. 1299, and Act of Congress 6th March, 1861.) This was an old regulation of the United States, and became that of the Confederate States, at the first Congress. It is a fair inference that such persons were deemed legally unfit, both separately, and as a class, for any military service. Such persons, besides being unfit, by reason of their tender years, had no disposition of their own time—they were bound to serve their fathers till they might be required to serve their country. In the next place, as the act of April makes all persons conscrips as they shall arrive to the age of eighteen years and subject to the call of the President as they come to that age, they have no right to evade that service by previously undertaking a service for an individual, inconsistent with this foreordained public duty, nor had any person a right, for his own benefit, to contract with them so as to produce that result in the face of a known law. The minor coming to the age of eighteen is quasi under the law prospectively. But there was no law which affected the man over thirty-five—nothing less than a *new* law could affect him; and his rights and duties could not be predicated on a law which might or might not be made.

Mr. Strong, with whom was *Mr. Bragg*, *contra*, argued as follows:

Is a conscript under the Act of Congress of April 16th, A. D. 1862, who was discharged upon furnishing a substitute, between the ages of thirty-five and forty, made liable to military duty by virtue of the second conscription act of September 27th, 1862? It is maintained by the Government, that he does thus become liable. The transaction is no contract,

but the mere grant of an indulgence, whereby the party is, for *his own* comfort solely, relieved from a hard service.—There was no possible inducement to the Government for such a contract—no consideration. The services of the substitute were at the command of the Government, as much as those of the principal; and Congress by taking primarily the principal, showed its preference for him as a soldier, and for the substitute as a citizen. So, there was a positive disadvantage to the Government. The labor lost and money spent in procuring the substitute, were not *at the request* of the Government, and can, therefore, furnish no consideration for a contract.

It cannot be supposed that Congress intended, without procuring thereby *the very slightest* advantage to the Government, to place it in the power of all men between the ages of eighteen and thirty-five years, to put themselves beyond the reach of their country's call, *during the war;* at a time too, when the enemy were declaring that our subjugation was a simple question of arithmetic, and depended upon the process of giving man for man, to death, or more if necessary, *till our last man was gone.* Such legislation would have been an act of madness unparalleled in the annals of time!

Congress had no *power*, under the constitution, to make such a contract. The right to call into service the military strength of the country, being a sacred trust, confided for the benefit of all, *cannot be alienated!* If so, one Congress could place it out of the power of a succeeding Congress to raise an army, and thereby that clause of the Constitution, giving Congress the power to raise armies be defeated. Congress cannot place, or allow to be placed, the whole fighting population, on the footing (for this purpose at least) *of foreigners.*

Mr. Moore contended, that from this conclusion, it would follow, that Congress would have no right to pledge the future revenue of the country so as to bind its successors. The cases are not analogous. It *would* be an analogous case should Congress *attempt* to make a contract with the citizen,

that if he would pay a certain tax now, he should never afterwards be taxed at all.

He contended, that it would also follow that no binding contract could be made that an army in the power of its adversary should fight no more during the war, and that it might, therefore, have to be cut to pieces! The difference in the two cases is, that under the war-making power, as interpreted by all writers upon international law, all contracts with the enemy, respecting the conduct of the war, are within the scope of the powers of the Government. The point here, is, that the contract is not within that scope.

It was further contended, that it would follow that Congress and the people could not stop this war. This is too clear a *non sequitur* to require any reply.

Whatever the name or nature of the arrangement with the principal, a sense of respect for Congress forces us to the conclusion that this condition was implied to wit: that the substitute should fill the place of his principal, and thus relieve him, till his *own* services became necessary, at which time he must take his own place, and the principal his. That his services have thus become necessary, is shown by the act of the 27th of September, 1862.

It is admitted, and is considered settled, that the principal does become liable when his *minor* substitute reaches the age of eighteen years. Yet, no consideration affects this case, which does not equally affect the other. In this, it is urged that the principal acted in view of the liability of his substitute, under the act of Congress, upon reaching the said age of eighteen. In the other, it may be equally well urged that he acted in view of the liability of his substitute, under the constitution, *a yet higher law*, upon an expression to that effect of the legislative will. How is it probable that the minor of sixteen years, would become liable? Was it not, under all the circumstances, equally probable, that he of thirty-six years, would also become liable? What then, is the difference between him of sixteen, and him of thirty-six?

It is objected in this case, that it would be absurd to sup-

pose that Congress intended the President "to call out and place in the military service," those who had been *already* called out, and were *already* in service. Is the supposition any the less absurd when applied to the youth, who, upon reaching eighteen, is *already* in the service. It is apparent from sections one, three and thirteen, of the act of April 16th, that Congress intended the language above quoted to apply to and embrace those already in the service—and that too, for a period longer than twelve months. The second sentence of the first section of the act, referring to the words above quoted, is as follows: "All of the persons *aforesaid*, who are *now* in the armies of the Confederacy, and *whose term of service will expire before the end of the war*," &c., showing that some were intended to be embraced whose term of service would *not* expire before the end of the war. If persons already in service are embraced in the act of April, they must be also in that of September, since their language *is identical.*

It was objected further, that it could not have been intended to send soldiers already in service to camps of instruction, and to use them for filling to the *maximum* other companies and regiments. But these provisions only apply to those who are to be enrolled, and those *only* are to be enrolled who have not been in service; see sections 4 and 6 of the act of April 13th, and the act of October 8th, 1862, establishing camps of instruction.

It is objected further, that if any bounty or privilege had been given to those called out under this act, no one would suppose, for a moment, that the substitute of thirty-six would be entitled to them? Why then suppose that the substitute of sixteen would be, on reaching eighteen? But, even admitting that they were embraced in the act, and had been so expressly declared, they would not be entitled to the bounty or privilege, because not within the *spirit* of that portion of the act, giving them.

It is argued that the regulation of the War Department directing soldiers in the service, over thirty-five years of age not to be discharged, is founded upon the view that they are not em-

braced within the body of the act. This is an error. It was founded upon that portion of the act which relates to this special subject matter: "All persons * * * over the age of thirty-five, who are now enrolled, &c., in regiments, &c., *hereafter to be re-organized*, &c., shall be required" to remain in service for ninety days, implying that at the end of that time they are to be discharged; act of 16th of April, sec. 1. Paragraph 4, general orders for 1862, No. 37, dated May 19th, respecting substitutes, is as follows: "the exemption is valid only so long as the substitute is legally exempt;" that is, so long as he would, in his own place and right, have been exempt, had he not become a substitute, because he ceases to be exempt *at once*, as occupying the place of another. This order applies to the case before us, in which the discharge was given, in July, 1862, and is expressed to be in accordance with "the regulations on the subject." This regulation, then, is as much a part of the discharge as if it had been written out in full therein. An admission that the regulation being matter of *legislation* is void, would not vary this conclusion. The principle would be same as if the discharge had been for a specific time, say six months, and in neither case, could the party get more than was promised him, and than he agreed to receive.

It is urged that the Secretary of War can only make regulations as to the time, manner, &c., of receiving substitutes—that the regulation in question, is a matter of legislation, and, conflicting with that provision of the constitution which declares that the Legislative, Executive and Judicial Departments shall be kept distinct, is void. But, suppose that Congress had, itself, regulated the time, manner, &c., of receiving substituies, would not that have been matter of legislation? And would it be any the less so, because it was done through its agent, the Secretary of War? In this view, all the regutions on the subject, are void, and so no one is entitled to discharge. But, that the Judicial, and Legislative, and Executive powers (of course) may be exercised by the same *subordinate* agents, see *Thompson* v. *Floyd*, 2 Jones' Rep. 313.

Upon any other construction than the one contended for by the Government, Congress, in passing the second act of conscription, legislated *in the dark*, as to how many they were calling into service; a conclusion forbidden by a proper respect for that enlightened body.

PEARSON, C. J. For the reasons given by me in the matter of Irvin and in the matter of Meroney, I am of opinion that the petitioner is entitled to exemption. In those cases, (see note*) I considered the subject fully, although I was not aid-

*Note—IN THE MATTER OF IRVIN.

The facts are, John N. Irvin, being liable as a conscript under the act of April 1862, offered in July 1862, one Gephart as his substitute; Gephart was 36 years of age, and in all respects a fit and sufficient substitute for the war, and was accepted by Maj. Mallett, commandant of conscripts, who thereupon gave Irvin an absolute discharge.

The petitioner avers he is advised that the conscription acts are unconstitutional, but it is not necessary for the purpose of this case to decide the question.

It is admitted, that under the regulations of the War Department, Major Mallett had full authority to accept substitutes, and give discharges; but it is insisted that Irvin's discharge was afterwards, by the action of Congress, rendered of no effect; for the act of September, 1862, makes all persons between the ages of 35 and 45, liable as conscripts; so Gephart became liable as a conscript, by reason whereof he was no longer a sufficient substitute; and thus Irvin's discharge had no further effect. If one, who is at the time liable as a conscript, should be offered and accepted as a substitute, it may be conceded the discharge, obtained in that way, would be void, because no consideration is received by the government, and the officer exceeds his authority. So, if after the conscription act of April, one who is under 18 years of age, is offered and accepted as a substitute, it may be conceded that the discharge would only be of effect until the substitute arrives at the age of 18; for as it was known to the parties that the substitute himself would become liable at that date under a law then in force, it will be presumed that the contract and discharge were made in reference to that state of things, and after the substitute arrives at the age of 18, the consideration fails, and the officer had no authority to grant a discharge for a longer time.

But, in our case, there was, at the time, no law in force under which it was known to the parties that the substitute would afterwards be himself liable as a conscript; on the contrary, he was in all respects a fit and sufficient substitute for the war, and was accepted as such, and an absolute discharge giv-

ed by the argument of counsel. The subject has been fully argued before the Court, and I have reviewed my opinion previously given, with an anxious wish to decide the question.

---

en ; so there was full consideration received by the government, and full authority on the part of the officer. The question is, does the subsequent action of Congress, to wit: the act of September, 1862, by its proper construction and legal effect, repudiate and make void the contract and discharge?

The construction of acts of Congress, so far as the rights of the citizens, as distinguished from the military regulations, are concerned, is matter for the courts.

Whether Congress has power to pass an act expressly making liable to conscription persons who have heretofore furnished substitutes, and received an absolute discharge, is a question not now presented, and one, which I trust, public necessity never will cause to be presented, as it would violate natural justice and shock the moral sense.

In my opinion, the act of September, 1862, by its proper construction, does not embrace men who were before bound, as substitutes, to serve during the war. It is true, the act, in general words, gives the President power to call into military service all white men, residents, &c., between the ages of 35 and 45; but this manifestly does not include men who are already in military service for the war, for this plain reason: there was no occasion to include them, they were bound before; and the true meaning and intent of the act is to increase the army by calling into service men who were not before liable. Suppose the act contained a provision giving a bounty of $500 to all men called into service under its operation, or providing that such conscripts should not be ordered out of their own respective States, would it be imagined that men who had previously volunteered for the war, or were substitutes for the war, would be entitled to the extra bounty, or to the special privilege of remaining in their own States? Certainly not, because there was no need of legislation in order to make soldiers of them.

A decent respect for our law-makers forbids the courts from adopting a construction which leads to the conclusion that it was the intention, by the use of general words, to include within the operation of the act, substitutes who were already bound for the war; not for the purpose of affecting them, but for the indirect purpose of reaching parties who had furnished substitutes, and in that, was asserting a power, which is at least doubtful, and certainly involves repudiation, and a want of good faith.

As the conscription act does not include substitutes, the conclusion that Gephart is no longer sufficient as a substitute, and that Irvin's discharge is of no further effect, fails.

It is considered by me that John N. Irvin be forthwith discharged with liberty to go wheresoever he will.

according to the proper construction of the act of Congress. The argument and my consultation with Judge BATTLE, confirms my judgment as to the correctness of the views taken

It is further considered, that the costs of this proceeding, allowed by law, be paid by James Irvin, (the officer arresting the petitioner,) to be taxed by the clerk of the superior court of Rockingham county, according to the statute in such cases made and provided.

The clerk will file the papers in this proceeding among the papers of his office. R. M. PEARSON, Ch. J. S. C.

At Richmond Hill, July 9, 1863.

*IN THE MATTER OF MERONEY.

The facts of this case bring it within the decision in "The matter of Irvin." That decision is put on the ground that the Conscription Act of Sept., 1862, does not embrace substitutes; and so the questions growing out of the regulations prescribed by the War Department, "where a substitute becomes subject to military service, the exemption of the principal shall expire," was not presented.

It seems to me that any one accustomed to judicial investigation cannot read the act and fail to come to the conclusion that it does not embrace volunteers and substitutes who were already bound to serve for the war; a different construction is excluded by the words used, and is inconsistent and repugnant to its provisions.

The President is authorized ", to *call out and place in military service* all white men, &c." The words "*call out*" and "*place in military service*" are not applicable to men who are already in the military service for the war; no legislation was necessary to make soldiers of them. If only a part is called for, provision is made for taking "those who are between the age of thirty-five and any other age less than forty-five," can this be applicable to volunteers and substitutes? It is further provided, that "those called out under this act, and the act to which it is an amendment, shall be first and immediately ordered to fill to their maximum number the companies, battalions, &c., from the respective States, &c., the surplus, &c." This supposes that the volunteers and substitutes composing the companies are to remain in the field, and the companies and battalions are to be filled up by those who are ordered into service under the conscript act.

Again, how can the regulation that all conscripts are to be sent to camps of instruction be applicable to volunteers and substitutes? Are they to be taken from the army and sent to camps of instruction? Certainly not, because they are not called out and placed in the military service under the conscription acts, but are bound for the war by the force of the original contracts of enlistment.

by me in those cases, and I refer to the opinions filed by me as the ground of my present conclusion.

I am informed that, soon after the conscription act of April, a regulation was made for the discharge of all volunteers for the war, who were over the age of thirty-five; and under it many were discharged, but the regulation was revoked, the War Department becoming satisfied that the act by its true construction did not apply to men who were bound by the terms of enlistment to serve for the war. This is the same construction given by me to the act. Under it all volunteers and substitutes, whether over or under thirty-five or forty-five, are to continue in service, because they are not embraced by the conscription acts. I can see no reason why this construction should not be followed to the further consequence, that as substitutes are not embraced by the conscription acts, and do not become subject to military service as conscripts, the fact necessary to the application of the regulations of the War Department, does not exist; consequently, the question that may grow out of that regulation, is not presented.

It is said the arrest of Meroney was ordered in disregard of the decision in the matter of Irvin, because the Secretary of War does not consider the construction given to the conscription act of September "a sound exposition of the act." The enquiry naturally suggests itself, who made the Secretary of War a judge? He is not made so by the constitution—Congress has no power to make him a judge, and has, by no act, signified an intention to do so.—It is true, for the purpose of carrying acts of Congress into effect, the Secretary of War, in the first place, puts a construction on them, but his construction must be subject to the Judiciary, otherwise, our form of government is subverted—the constitutional provision by which the Legislative, Executive and Judicial departments of the government are separate and distinct, is violated, and there is no check or control over the Executive.

According to the view taken by me, it is not necessary, for the purpose of this case, to decide upon the legal effect of the regulations prescribed by the Secretary of War in regard to receiving substitutes, but as those regulations are relied on as authorizing the arrest of the petitioner, it is proper for me to say that many objections, entitled to consideration, may be urged to the power of the Secretary of War, to make the regulations in question. The enactment under which it is assumed, that the power to make a regulation that "in all cases where a substitute becomes subject to military service, the discharge of the principal shall expire," comes within the scope of the power confided by Congress, in the 8th section of the conscription act of April, 1862, in these words: Persons not liable for duty may be received as substitutes for those who are, *under such regulations as may be prescribed by the Secretary of War.*"

The obvious construction of this section seems to be—substitutes may be

BATTLE, J. My opinion concurs with that of the Chief Justice, that a person liable to military service as a conscript under the act of April, 1862, and who, by virtue of the 9th section of that act, regularly procured a discharge by furnishing a proper substitute, cannot be again enrolled as a conscript under the amendatory act of September, 1862, though such substitute may have been, when received, between the ages of thirty-five and forty-five years.

Cases like the present, have been so often and so recently decided in the same way by different Judges, and the reasons upon which the decisions were founded, have become so generally known through the medium of the newspapers, that it is unnecessary for me to do more than to state briefly my conclusions on the subject.

Persons between the ages of eighteen and thirty-five years,

---

received on two conditions, one implied, to wit: The substitute must be an able bodied white man, fit for military service in the field; the other expressed, to wit: The substitute must be a person who is not liable to military duty under the existing law; the time, place and manner of *receiving substitutes*, in which is included the mode of deciding whether he is an able bodied white man not liable to duty, to be regulated by rules prescribed by the Secretary of War.

If the regulation, in question, be confined to cases where the substitute being under the age of 18, afterwards arrives at that age and *becomes* liable to military duty, it accords with the provision of the act. But, if it be extended to cases where the substitute is not at the date of the contract of substitution liable to duty, but is afterwards *made liable* by a subsequent act of Congress, it departs from, and goes beyond the provisions of the act by adding a third condition, and the power to do so, may well be questioned; especially, where the regulation as well as the act of Congress, which is supposed to give it application, are both subsequent to the contract of substitution, and the discharge is absolute on its face. For illustration, suppose a regulation to be prescribed that in all cases where the substitute is killed or disabled, or where he deserts, the discharge shall expire, which stand on the same footing, with the regulation that the discharge shall expire if the substitute is made liable to duty by a subsequent act of Congress, for all add a third condition to the two imposed by the act, and it may be urged against them that the power to add other conditions than those contained in the enactment is an *act of legislation*, which Congress has no right to delegate to a department of the Executive branch of the Government, and of course an in-

who have furnished substitutes, are certainly not within the meaning of the Act of September, 1862, because that act is a call, in express terms, for persons between thirty-five and forty-five years of age. Volunteers and substitutes between the latter ages are not embraced, because, being already in the military service, they cannot, with any sort of propriety of language, be said to be called out and placed in that service, nor can it, for a moment, be believed that such volunteers and substitutes were intended to be taken from the companies and regiments of which they were already members and sent off to fill up other "companies, battallions, squadrons and regiments." Not being liable to be called into service under this act, the substitutes cannot be taken away from their principals by force of the act, so as to leave the latter liable again under the act of April, 1862, as having no person substituted and serving in their stead. If such principals can be made liable, then, it must be on account of some condition, either expressed or implied, contained in the discharges. The only pre-

tention to do so, can only be inferred from plain and direct words, and the words, in this instance, are satisfied by the construction stated above.

The same question of construction is presented in the matter of Huie, from Cabarrus county, under a clause in the exemption act, which exempts all persons who shall be held unfit for military service in the field *under rules to be prescribed by the Secretary of War*, where the power is confined to making rules to ascertain whether the person is or is not fit for military service in the field, and it is decided that the act does not confer power to prescribe a rule under which a citizen may be taken as a conscript, although held unfit for military service in the field, on the ground, that he may answer some purpose in the hospitals, &c. These instances tend to show the wisdom of the Constitution in not confiding legislative, judicial and executive powers to any one department.

I am of opinion, that the petitioner is entitled to exemption.

Therefore, it is considered by me, that P. P. Meroney, be forthwith discharged, with leave to go wherever he will. It is further considered, that the costs of this proceeding, allowed by law, to be taxed by the clerk of the superior court of Rowan county, according to the act of the General Assembly, be paid by Jesse McLean, (the enrolling officer.)

The clerk will file the papers in this proceeding among the papers in his office and give copies. R. M. PEARSON, Ch. J. S. C.

At Richmond Hill, July 4th, 1863.

tense for an express condition is a recital in their discharges, that they are given under the orders and regulations of the War Department. The regulations of that department, made at the time when the discharges were granted, were, that the substitute should not be liable to military duty, and should be found, upon an examination by a surgeon or assistant surgeon of the army, to be sound, and in all respects fit for military service; see General Order, No. 29. The Secretary of War had no power afterwards to make an order to have a retrospective operation to affect rights already attached. The Legislature may pass retrospective laws, but it is very certain that no other department of the government can. I conclude, then, that the discharges were not subject to any express condition of the kind, contended for.

Neither can any such condition be implied. If any can be implied, it can only be upon the ground that the conditional event was in the contemplation of the parties at the time the discharge was given. When the act of April, 1862, gave to conscripts the right to employ, as substitutes, persons not liable under that act to perform military duty, could it have been contemplated by the parties, that the substitutes were to be taken away by another act of Congress, to be passed in a few months afterwards? Such a contingency was not so probable as that the substitute might desert, or die of disease, or be killed in battle, and yet no person contends that these contingencies should be regarded as conditions implied in the discharges. The truth is, it was a *casus omissus*, for which Congress neglected to provide, and it is too late for the War Department to attempt to remedy the mischief, by assuming to legislate under the name of regulations.

Whether Congress has the power to apply a remedy, and whether it is expedient for it to exercise that power, if it has it, is a question which it is not my province to decide. I have discharged the only duty which devolved on me in this case, when I say, I think that the petitioner is entitled to his discharge.

Per Curiam, Petitioner discharged with costs against the officer seizing him.

In the matter of SOLOMON N. GUYER, *a blacksmith.*

Soldiers who had been "placed in the military service of the Confederate States in the field," under the conscription act of April, 1862, and were so at the time of the passage of the exemption act of 11th Oct. 1862, were *held* not to be entitled to exemption under that act.

But where a blacksmith, after being so enrolled was, at the time of the passage of the exemption act, not so placed in service in the field, but was detailed to work on a government contract, and did so work at his trade, at accustomed wages, not having received any bounty, pay, rations or clothing, up to that time, it was *held* that he was entitled to exemption.

The petitioner was a blacksmith, and had worked at the trade for ten years. In May, 1862, he quitted his shop and went to work in the armory of one B. Weathersbie, who was engaged in working for the State of North Carolina. On the 8th of July, he was enrolled as a conscript, and shortly thereafter, was detailed at Weathersbie's request to work in his armory, where he remained until the contract was abandoned in the latter part of March, 1863. From the last of March to 19th of May, the petitioner was in the service of Capt. Coffin, in command of the armory, and was working there at his trade of a blacksmith; whence he was directed by Coffin to report to Lieut. Anderson, enrolling officer for the 6th Congressional District of North Carolina, which he did as soon as he could find him, to wit: on 22d May, 1863. He then filed his affidavits for exemption, and the proofs necessary to sustain his application, and insisted on his discharge, but this was refused, and he was sent to the camp of instruction near Raleigh, where he was detained, and is still detained by the order of Col. Peter Mallett, commander of the said camp of instruction. Up to the time of the arrival of petitioner at the camp, he had never received any bounty, pay, rations or clothing: but since then, he received a few articles of clothing, (which are specified in the proofs,) and his daily subsistence. For these causes, he applied for a writ of habeas cor-

pus to this Court, and on its return, with the cause of his detention, the cause was argued by

Gilmer and *Scott*, for the petitioner.
Strong, Dist. Atto. of Confederate States, and *Bragg*, *contra*.

PEARSON, C. J. For the reasons given by me in my opinion, *In the matter of Nicholson*, the Court is of opinion that the exemption act of October 11th, 1862, applies as well to the conscription act of April, 1862, as to the conscription act of September, 1862, and the reasoning in Nicholson's case is now referred to as the ground of the decision of the Court on that point.*

*Note—IN THE MATTER OF NICHOLSON.

The facts are: Nicholson is thirty-three years of age, is a miller and millwright—skilled in both trades. He was enrolled as a conscript 8th of July, and was ordered into service 15th of July, 1862. Between the 8th and 15th of July, he applied to the commandant of conscripts for a special exemption as a miller; this was refused; he, nevertheless, failed to report, and continued at his trade as a miller, as he had habitually done for many years before. In August, 1862, he went into the armory of Lamb & Co., expecting to be detailed, but left before the detail was made, and set into work for one Shipman, as a mill-wright, where he worked until the 1st January, 1863, when he went to Virginia, and set to work as a mill-wright for one Lamb, where he remained actually employed at his trade until March, when, coming into this State, on a visit to his family, he was arrested as a recusant conscript. He has made the affidavit as required by the exemption act.

In the matter of Mills, a shoemaker, and Angel, a wagonmaker, I decided that the exemption act, October 11, 1862, applied as well to the conscription act of April, as to the conscription act of September. I see no reason to change my opinion. The act adds to the list of exemptions contained in the exemption act of April—uses general words applicable to both conscription acts, "all shoemakers, tanners," &c.—makes no distinction between persons under or over thirty-five, and repeals the former exemption act, showing obviously that the intention was in reference to the conscription act of April, to put the last exemption act in place of the act repealed, and make one exemption act answer for both conscription acts. If this be not so, there are no exemptions between the ages of eighteen and thirty-five, and Governors of the States, Judges, members of the Legislature, &c., under the age of thirty-five, are liable as conscripts; nay, all persons, although "unfit

In regard to the proper construction of the exemption act, in its application to the conscription act of September, 1862, the Court is not called on to express an opinion, as there is no case before it, which involves the question.

In regard to the proper construction of the exemption act, in its application to the conscription act of April, 1862, the Court is of opinion that no person is embraced by its provisions so as to be entitled to exemption as a shoemaker, tanner, &c., who was, at the date of its passage, in the army as a sol-

for military service, by reason of bodily or mental infirmity," are liable as conscripts, if under the age of thirty-five. Such a construction is inadmissable. It was said by Mr. Scott, on the argument, "This difficulty is met by the power given to the President to make special exemptions." But it could not have been the intention to make Governors, Judges and members of the Legislature dependent upon the pleasure of the President; the object was to entitle them to exemption, *by law*, and *not by favor*.

It was also said, if the act applies to the conscription act of April, it must have a retro-active effect, and its construction will present many difficulties. That is true; but when the clear intention of the law-makers that the one act should apply to the other, it becomes the duty of the Judges to adopt such a construction as will make them fit in the best way they can be put together.

In the matter of Mills and Angel, it was not necessary to fix on the time when the act requires the party to be actually employed at his trade, for they were not ordered into service until after its passage, and were, without default, actually employed at their trades, both at the passage of the act, and when ordered into service, and taking either date as "the time" were entitled to exemption.

In this case, the point is directly presented. If "the time" be when the party is ordered into service, then Nicholson was entitled to exemption, and his subsequent conduct in keeping out of the way, and going to Virginia to avoid an arrest, does not prejudice his right, it being induced by the unauthorized act of Government officers in attempting to arrest him, although the more commendable course would have been to insist openly on his right. If however, "the time" be when the exemption act passed, then he was liable as a conscript, and although actually employed at his trade, cannot claim for that reason, to stand on higher ground, in this respect, than if he had been in the army, because of the maxim, "no man shall take advantage of his own wrong."

The clause, under consideration, does not (except indefinitely, in the proviso,) refer to the time when the person claiming to be exempted, must be

dier; that is, who had, prior to the passage of the act, been *placed* in the military service of the Confederate States in the field. But that all "shoemakers, tanners, &c., under the age of thirty-five years, who had not been, prior to the passage of the act "placed in the military service of the Confederate States in the field," are embraced by its provisions, and are entitled to exemption, whether the fact of the party's not having been placed in military service in the field, be owing to his not having arrived at the age of eighteen years, or to his

actually employed at his trade. It makes no exception of persons then in service, or who had been ordered into service, and puts the stress on the fact of actual employment. It is in these words: "All shoemakers, tanners, &c., skilled and actually employed in the said trades, habitually engaged in working for the public, and whilst so actually employed, provided, said persons shall make oath, in writing, that they are so skilled and actually employed *at the time*, as their regular vocation, in one of the above trades, which affidavit, shall only be *prima facie* evidence of the facts therein stated."

In reference to the conscription act of September, it is clear, "the time" is when the party is ordered into service; that being the time when the affidavit is called for, to enable him to claim exemption. But in reference to the conscription act of April, it is not so easy to fix the time. The difficulty arises from the fact, that the exemption act is applicable to both conscription acts; one of which, was passed six months before the other, and after it had, in a great measure, been carried into effect. In my opinion, "the time" is the same in reference to the act of April, as in reference to the act of September, to wit, when the party is ordered into service. Had the time of the passage of the act been intended, it is reasonable to presume, that the words would have been "*now* actually employed," as in the clause just preceding, in respect to physicians, "at *this* time." The policy of exempting shoemakers, &c., being not to favor the individual, but to subserve the public interest, which was greatly prejudiced by taking tradesmen from their occupations—it was immaterial whether the tradesman was under or over the age of 35 years.

The material inquiry is, was he working for the public at the time, which naturally refers to the time when he was called off from his trade—taking the distinction between *volunteers*, who, of their own accord had quit their trades, and *conscripts*, who had been taken from their trades by act of law and should be considered in reference to the intended exemption as still at their trades. This construction is called for by the rule, "the same words in the same statute, ought to have the same meaning," and as in reference to the act of September, the meaning certainly is, when the party is ordered into service, the same words cannot have a different meaning in reference

not being in the State, or to his not having been enrolled by an oversight or neglect of duty on the part of the enrolling officer, without default on the part of the party himself, (which is one of the cases before us,) or if enrolled, that he was not ordered into service by similar laches of the officer, (which is another case before us,) or to the fact that when enrolled, the party was detailed to work as a shoemaker, or blacksmith, or wagonmaker, in the employment of a government contractor, the person so detailed, receiving no bounty, or pay, or

to the act of April. Had it not been the intention to include all shoemakers, &c., without regard to age, this result would have been avoided, by adding the words, "provided no shoemaker, &c., shall be exempted, who is now in service, or has been ordered into service." So, the question is narrowed to this: Can the Courts add these words to the act? I see no ground on which the omission, if it be one, can be supplied by construction. It was urged by Mr. Scott, that the public interest required as many soldiers as could be raised, therefore, an intention to exempt any, who were already in service, or who ought to have been in service, can only be infered from plain and direct words. This was met by Mr. Gilmer with the suggestion, that the public interest required that tradesmen should not be taken from their vocations, and that those who have been taken off by act of law, should be allowed to return; as it was seen the public interest had been prejudiced, and it was a matter of difficulty for the people to get a pair of shoes, or have a plough sharpened, &c., and that the benefit of a matter of doubt, if there be one, arising from a want of precision in an act of Congress, should be given to the citizens, rather than to the Government.

Giving to these suggestions, proper consideration, the inquiry, whether the intention was to consult the public interest in the army or at home, can only be answered by the words used. The clause, under consideration, does, "in plain and direct words," exempt all shoemakers, &c., and does not except those who are in the army, or ought to have been in the army, at the passage of the act, and the indefinite words in the proviso, "actually employed at the time," cannot, by any recognized rule of construction, make the exception.

And it does, "in plain and direct words," repeal the exemption act of April. This fact has an important bearing on the question of construction; for, if it was not the intention that the additional exemptions should apply to persons under thirty-five, why repeal that act? And if such was the intention, the only way in which it can be carried out, and the exemption act be made to fit the conscription act of April (with a few exceptionable cases like Mills and

rations, or clothing, as a soldier, but receiving only his accustomed wages as a journeyman tradesman, of which kind is the case now under consideration, and several other cases before us, or whether they had been allowed to remain at home "as a reserve," receiving no pay as soldiers, under the provisions of the sixth section of the conscription act of April.—In other words, we draw the dividing line between those who had become *soldiers*, and those who had not *left the walks of private life*, and were *actually employed* in their respective trades at the date of the passage of the exemption act.

The task of making an application of the exemption act to a conscription act, which was passed six months before, and had, in a great measure, been carried into effect, (as I say in Nicholson's case,) is a very difficult one. It is hard to make the one fit the other. The Court has been aided by very full and able arguments at the bar, and after weighing the suggestions offered pro and con, and taking into consideration the act of 9th of October, 1862, (two days before the exemption act,) which authorizes the President to detail *from the army*, persons skilled as shoemakers, (not exceeding two thousand,) to make shoes for the soldiers, to which our attention was for

---

Angel) is to give it relation to the time when the party was ordered into service and taken from his trade.

Whether shoemakers, &c., who were in service as conscripts when the act passed, can *now* claim exemption, or would be taken to have waived the right, by acquiescence, in afterwards receiving pay, &c., is not the question now presented.

Nicholson certainly has done no act that can amount to a waiver of his right; he has not received the State bounty—has received no pay, and has done nothing from which acquiescence can be applied.

It is considered by me that Nicholson is entitled to exemption, and that he be forthwith discharged, with leave to go wherever he will. It is also considered, that Lieutenant Anderson (the enrolling officer) pay the costs of this proceeding, allowed by law, to be taxed by the clerk of the superior court of Guilford county, according to the statute in such a case made and provided.

The clerk will file the papers in this proceeding among the papers in his office, and give copies to Nicholson and Lieutenant Anderson.

R. M. PEARSON, Ch. J. S. C.

At Richmond Hill, May 4th, 1863.

the first time called by *Mr. Bragg*, and of which neither member of the Court was before apprised, we have come to the conclusion stated above.

On the one hand, a construction confining the operation of the exemption act to the few persons who may have arrived at the age of eighteen years, after the passage of the conscription act, and the few exceptionable cases where persons under thirty-five years of age had, by the omissions of the Confederate officers not been enrolled, would certainly be restricting it too much; on the other, to extend its operation to all shoemakers, tanners, &c., who were in the army, would seem to carry it too far, and the act referred to (9th October,) taking men *out of the army*, by detail, to make shoes for soldiers, (restricting the number to two thousand,) is inconsistent with the fact, that two days thereafter, it was the intention to take "all shoemakers, tanners, &c., from the army, and send them home to work at their trades. So, that broad construction is excluded. The same act furnishes proof that the members of Congress were aware of the fact that the number of artizans, working at their respective occupations, was not enough to supply the necessities of the public. From this we arrive at the conclusion, without going into a particular examination of the words used, that all soldiers were to continue in service, and all who were at home, *actually employed* at their trades, should remain there, and be exempted as long as they should continue to work at their trades, at prices not exceeding seventy-five per cent. on the cost of production.

This construction varies in some measure, from that given by me to the act in the opinion delivered *In the matter of Nicholson;* but the difference does not affect any case now before us; the distinction being that in my opinion *then*, soldiers were embraced by the exemption act, but those who failed to make their election, and afterwards received pay, rations, clothing, &c., were to be considered as having waived their right to exemption; whereas, in the opinion of the Court, in which I fully concur, soldiers or persons who had been *placed*

in the military service in the field, were not embraced by the exemption act. Its practical application to the only case of the kind before us, (*In the matter of Dixon*,) results in the same way. He was under thirty-five, was in the army as a conscript when the exemption act passed—had received the bounty, pay, &c., of a soldier afterwards, up to November, 1862, and was not entitled to exemption; whether on the ground that the exemption act did not embrace his case, or if it did, that he had waived the right, makes no difference, as in either view, he was to be remanded.

PER CURIAM, Let the petitioner be discharged, and recover his costs.

In the matter of BARFIELD GRANTHAM, *a shoemaker.*

The conscription act requires that the trade on which the claim of a mechanic to exemption is based, shall be his regular occupation and employment, and not that at which he may work occasionally and at odd times.

The facts are stated in the opinion of his Honor.

Everett, for the petitioner.
Strong and *Bragg*, contra.

BATTLE, J. The petitioner claims to be exempt from military service as a conscript, upon the ground that he was a shoemaker. The testimony offered in support of his claim, shows that for some years past, he had a small farm on which he worked during the spring and summer, but during fall and winter he made shoes for his own family, and for some of his neighbors. In August, 1862, he commenced, and continued to do more work in the business of making shoes than he had been previously accustomed to do, though it does not appear that he devoted himself exclusively to that occupation.

This proof is not, in our opinion, sufficient to establish the right to the exemption for which the party contends. The conscription act requires that the trade upon which the claim of a mechanic to exemption is based, shall be his regular occupation and employment, and not that at which he may work occasionally and at odd times. A mechanic is excused from military service, not for his own ease, and as a favor to himself, but for the benefit of the public, whom, it is supposed, that he can serve better by working at his trade, than in any other way. He must stand towards the community upon the same footing that a common carrier does, so that all persons who may have occasion to claim the aid of his services, may, at all seasonable times, be able to obtain it.

The petitioner has not shown himself to be within the limits of this rule, and his application for a discharge is, therefore, rejected.

PER CURIAM, Application rejected.

In the matter of MOORE W. DOLLAHITE, *a School Teacher.*

A school master whose occupation had been suspended for twelve or eighteen months, within the term required for his previous pursuit of the business, is not entitled to an exemption under the act of Congress, passed on the 11th of October, 1862.

This was a petition for a habeas corpus by the plaintiff, who is a citizen of Person county. The facts of the case appear from the opinion of the Court.

Winstead, for the petitioner.
Strong, Dist. Atto. of Con. States and *Bragg*, contra.

BATTLE, J. The petitioner claims to be exempted from military service, in the army of the Confederate States, upon

the ground of being the teacher of a school. The clause of the exemption act, which relates to his case, is as follows:— "all presidents and teachers of colleges, academies, schools, and theological seminaries, who have been regularly engaged as such, for two years previous to the passage of this act," which was the 11th October, 1862. He states that he had been engaged as a teacher for ten or twelve years before the passage of the conscript act, but that his school had been suspended for twelve or eighteen months, in consequence of the troubled condition of the country. He states further, that at the time of his enrolment, he was again engaged in teaching a school.

It seems from the papers which accompany the petition, that the case of the petitioner had been referred by the commandant of the camp of instruction, to the Bureau of Conscription at Richmond, when the following decision was pronounced: "Exemption declined. The object of the law of October 11th, 1862, in defining certain classes to be exempt from the operation of the conscript acts, was not to attach privileges to those classes, but to abstain from breaking up the existing civil and industrial organizations of the country.— Exemptions, therefore, have reference to the *status* at the date of the passage of the act. No antecedent or subsequent coming within the classes enumerated, can entitle to an exemption. In the case of school teachers and physicians, the profession must not only have been in existence on October 11th, 1862, but also the pursuit of it, both then and for a specified time previous." We concur in the above decision, and think that the reasoning upon which it is founded, fully sustains it. As to the time when the *status* of some of the enumerated classes is to be fixed, we may differ in opinion from the distinguished head of the Bureau of Conscription, but as to school teachers and physicians, the act is express, and leaves no room for doubt.

PER CURIAM, The petitioner must be remanded back to the custody from which he was taken, and must pay the costs of this proceeding.

In the matter of ELIAS RITTER.

A person who had been *drafted*, and who had put in a substitute that was accepted by the officer appointed to act on that business, *was held* not liable to be conscripted under the act of September, 1862.

The circular of the War Department, dated 20th October, 1861, allowing substitutes to be received after the companies were formed and actually in the service, applies, by a liberal construction, to companies while in the condition of being formed and organized or recruited, and when a substitute is received under the latter circumstances, several of the formalities for obtaining a discharge, become immaterial.

Petition for a HABEAS CORPUS, before the Supreme Court, Elias Ritter, the petitioner, on the call on the State of North Carolina for troops, was drafted on 25th of February, 1862, to go into actual service. He then hired a substitute over eighteen years of age, by the name of Medlin, for three years or the year, who was received by Col. Richardson, an officer authorised by the government to receive substitutes. Medlin entered into the service for the war, and the petitioner received his discharge from Col. Richardson. Under the conscription act of April, 1862, Ritter was not called on, (being over thirty-five,) but under that of September, 1862, (being under 45) he was enrolled and ordered into the camp, near Raleigh, and was held there against his will by the officer in command.

It was insisted, on the argument, that as no company was organised when the substitute was offered and received, that he did not, and could not, comply with the requisitions of the department in furnishing of substitutes.

The regulations of the War Department, alluded to above, are as follows:

"WAR DEPARTMENT, Richmond, Oct. 20, 1861.

"1. When any non-commissioned officer or soldier of the volunteer service desires to procure a substitute, he shall first obtain the written consent of the Captain of his company and of the commander of his regiment or corps, a duplicate of which he shall forward to the substitute.

"2. The substitute shall then obtain from some surgeon and some commissioned officer in the service of the Confederate States, a certificate of his fitness for service and of his having

been mustered into the service of the Confederate States for the war, no matter what the term of the service of his principal may be, and these several certificates shall serve as a passport to the holder to join the regiment or corps to which his principal belongs—he paying the expenses of his own transportation.

"3. When a non-commissioned officer or soldier is entitled to discharge, by reason of a substitute, the Captain of his company and the commander of his regiment or corps shall give him a certificate to that effect, stating that the substitute furnished, according to the regulations, is actually on duty with the regiment or corps; that the holder of the certificate is in no wise indebted to the Confederate States, and that he is not entitled to transportation at the expense of the government, and this certificate shall serve the holder as a passport to leave the camp and travel to his home.

"4. If it shall be found that a non-commissioned officer or soldier, discharged by reason of a substitute, is indebted to the government, the commander of the regiment or corps giving the discharge, will be held accountable for the same, and any back pay due said non-commissioned officer or soldier, shall be drawn and receipted for by the substitute at the next pay day.

"5. Commanders of regiments or corps shall, under no circumstances, permit substitutions in their commands to exceed one per month in each company, and all such cases shall be noted in the following morning report of the regiment or corps, in which they occur, and in the next muster roll and monthly return."

McDonald, for the petitioner.
Strong and *Bragg*, contra.

Pearson, C. J. We are of opinion that the circular, from the war department, dated October 20, 1861, by which substitutes were allowed to be received after the companies were formed and actually in service, applies, by a liberal construc-

tion, to the companies while in the act of being formed or organized, or recruited, without the necessity of the details, which were made material by the fact that when the party was in service, and wished to put in a substitute, many circumstances had to be attended to, in order to prevent confusion—as the back pay or indebtedness of the principal and mode of getting home, and then to allow too many at a time, might disorganize the company; but when the companies were in the act of being organised, no considerations of that nature were presented, and the purpose was fully answered, by putting in an able bodied man for the war, and if proof can be made that these essentials were complied with, the object is fully answered when the substitute went into the service, and is still there, or has been killed, or disabled.

PER CURIAM, Petitioner discharged.